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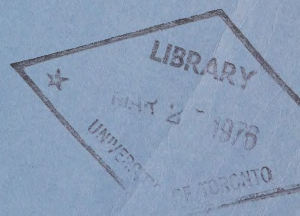
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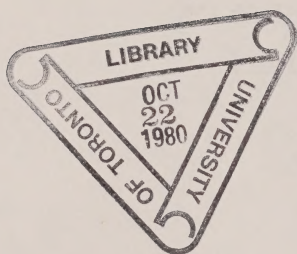
ONTARIO LABOUR RELATIONS BOARD

ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1975] OLRB REP.





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process. In fact, it is not clear that the situation is either unique or to the employer's disadvantage as many negotiators experienced in public service and quasi public service negotiations can attest.

8. Accordingly, the Board finds that all employees of the respondent who are engaged in caretaking and maintenance in the County of Victoria regularly employed for 24 hours or less per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and employees covered by a subsisting agreement between the respondent and the Canadian Union of Public Employees, Local 855, constitute a unit of employees appropriate for collective bargaining.

...

10. In this regard, the respondent submitted the names of nine employees employed within the above-described bargaining unit and the applicant submitted membership evidence corresponding to six of these employees. Two of the membership cards were dated December 9, 1974 and December 11, 1974, respectively. The date of application in this matter was June 5, 1975 and the terminal date set by the Board under section 92(2)(j) of the Act was June 16, 1975. Where an applicant produces satisfactory membership evidence on behalf of more than sixty-five per cent of the employees in a bargaining unit, the Board's practice is to grant outright certification. However, the Board's power under section 7(2) in this regard is discretionary and where the Board is confronted with membership evidence that pre-dates the date of application by more than six months a representation vote is normally directed—the presupposition being that such membership evidence is inherently unreliable. There was some doubt at the hearing in regard to the calculation of this six month period but a reading of the Board's jurisprudence confirms that the six month period is calculated back from the date of application, not the terminal date. (See Doyle's Bakery 52 CLLC 18,063; Ben Bruinsma and Sons Ltd. [1963] OLRB M.R. July 223; P.E. Brule Ltee. [1964] OLRB M.R. Feb. 597; Victoria Shipping Service Ltd. [1966] OLRB M.R. July 252; Howard S. Clark [1967] OLRB M.R. Sept. 533; Belleville General Hospital [1967] OLRB M.R. Sept. 569.) Indeed, this panel cannot conceive of a rationale that would make the terminal date of the application the appropriate standard in this respect

and thus cases like W.N. Construction (Ottawa) Ltd. [1968] OLRB M.R. Sept. 645 and Kawneer Installations Ltd. [1971] OLRB M.R. 674 would appear to be misstatements of the Board's policy. Thus the membership evidence in this particular application supports the issuance of a certificate and the Registrar is so directed.

7516-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. CANWALL CONTRACTORS LIMITED (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members E. Boyer and F. W. Murray.

APPEARANCES AT THE HEARING: L.C. Arnold appearing for the applicant; A. E. Golden and I. Springate appearing for intervener #1; no one appearing for either the respondent or intervener #2.

DECISION OF THE BOARD: July 2, 1975.

. . .

4. The applicant is seeking to displace intervener #1 as the bargaining agent of a bargaining unit of plasterers and plasterers' apprentices employed by the respondent in the Board's geographic area #8. Intervener #1 argued that the applicant was not entitled to have the appropriate bargaining unit described in terms of "all plasterers and plasterers' apprentices" but rather in terms of "all employees". The applicant conceded that it is not able to establish its entitlement to a bargaining unit which has been determined in accordance with the provisions of section 6(2) of The Labour Relations Act. However, the applicant argues that because it is seeking to displace intervener #1 it is entitled to the bargaining unit which intervener #1 represents in its bargaining relationship with the respondent, namely, all plasterers and plasterers' apprentices employed by the respondent in the Board's geographic area #8.

5. The conditions under which the Board may determine a craft bargaining unit are set forth in section 6(2) of The Labour Relations Act. The applicant conceded that it does not qualify under section 6(2) with respect to a bargaining unit of plasterers and plasterers' apprentices. Notwithstanding this

situation, however, there is nothing in The Labour Relations Act which prevents the applicant from seeking to displace intervenor #1 as a bargaining agent with respect to a bargaining unit of plasterers and plasterers' apprentices. In order for the Board to give effect to sections 3 and 5 of The Labour Relations Act, any trade union which either by its constitution or the provisions of section 92(4) of The Labour Relations Act is able to take into membership the employees who are included in the craft unit may seek to displace the incumbent craft trade union. Even though the bargaining unit is described in craft terms it is determined by the Board as an appropriate bargaining unit pursuant to the terms of section 6(1) of The Labour Relations Act. Intervenor #1 relied on the decision of the Board in the Hunter Printing London Ltd. case [1973] OLRB REP. 215 in support of its proposition that the appropriate bargaining unit should be described in terms of "all employees". In the latter case, the Board permitted the attempted displacement of a craft trade union which represented its craft in collective bargaining. In permitting such attempt, the Board stated that in the event that the applicant was successful, the appropriate bargaining unit would be described in terms of "all employees". However, the Board notes that in the Hunter case, the description of the proposed bargaining unit which was indicated by the Board was limited, in effect, to the bargaining unit which was being displaced. The Hunter case involved competing trade unions in the industrial context. In the instant application, the construction industry is involved and the Board is not disposed to follow the example of the Hunter case. In our view, the approach which was fashioned by the Board in the Winter and Son Limited case, OLRB M.R. October 1966, p. 889, is the appropriate example which parallels the circumstances of this application. In the Winter case, the Board expressed concern about bargaining units of construction employees being all inclusive, as they are when described in terms of "all employees". The Board in that case pointed out that such units might well lead to jurisdictional disputes particularly where only one or two trades are employed at the date of the making of the application or where an employer decides to expand the scope of his business.

6. In applications for certification which involve attempts to cross traditional craft lines, the Board, by limiting the appropriate bargaining unit to the bargaining unit which the incumbent trade union represents in collective bargaining, is not expanding the potential area of conflict in the jurisdiction of trade unions beyond the actual area of conflict which the applicant trade union has elected to pursue.

7. Intervener #1 also challenged the ability of the applicant to take into membership the employees who are affected by this application. The constitution of the applicant does not specifically state that the plasterers and plasterers' apprentices are entitled to membership in the applicant. However, even assuming that plasterers and plasterers' apprentices are not entitled to membership in the applicant by virtue of its constitution the Board is satisfied on the evidence before it that the applicant has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws within the meaning of section 92(4) of The Labour Relations Act. Intervener #1 relied on The Journal Publishing Company of Ottawa Limited case OLRB M.R. December 1970, p. 925 in support of its argument that in order that an established practice be proved within the meaning of section 92(4) it is necessary that the trade union knowingly have such an established practice. The Board finds on the basis of the evidence before it that the applicant was aware of its established practice.

8. Having regard to the foregoing and to the provisions of section 6(1) of The Labour Relations Act, the Board further finds that all Plasterers and Plasterers' Apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

...

11. A certificate will issue to the applicant.

...

0350-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. YORK CONDOMINIUM CORPORATION #75 (Respondent).

BEFORE: George W. Adams, Vice-Chairman, and Board Members O. Hodges and F.W. Murray.

APPEARANCES AT THE HEARING: George Allen for the applicant, Douglas G. Smith, David I. Wakely, Brian S. Franks and David Middleton for the respondent.

DECISION OF THE BOARD:

July 4, 1975.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Labour Relations Act, R.S.O. 1970, c. 232.
3. The applicant seeks to be certified as the exclusive bargaining agent for all employees of the respondent engaged in cleaning and maintenance at York Condominium #75, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.
4. The respondent submitted that the appropriate bargaining unit ought to be described as consisting of "all employees of the respondent at Toronto, save and except property managers, persons above the rank of property manager, office and clerical staff".
5. The Board was informed that the respondent corporation was a corporation incorporated under The Condominium Act R.S.O. 1970, c. 77 and was incorporated in regard to only one building. The Board was further informed that save for the specific exclusions proposed by both the applicant and the respondent, the respondent employed no other employees. Accordingly in light of the Board's practices the respondent's proposed description is preferable.
6. However, despite its proposed description, the respondent submitted that certain individuals classified as resident superintendents should be excluded from the bargaining unit on the basis that section 1(3)(b) was applicable. The situation is quite novel.
7. It was not contended that as resident superintendents these individuals were employed in a confidential capacity in matters relating to labour relations or that in this capacity they exercised managerial functions. Rather it was submitted that the two particular people concerned were owners of units in the condominium building subject to the application and as unit owners have access to confidential information in regard to the financial operations of the respondent; they have a right to sit on the board of directors of the respondent although neither does; and finally, they have the right to vote in regard to decisions made by the respondent including decisions involving the manage-

ment of the property which would presumably include matters affecting the employment relationship of the resident superintendents.

8. The Board was informed that the respondent corporation represents a building comprised of 400 units. Thus the resident superintendents are only two of some 400 owners, all of whom have the legal rights listed above and in this sense they are not very dissimilar from the employees of a large corporation who own a small portion of stock in the employer corporation. The extreme minority position of the two resident superintendents means that they cannot be said to play an effective and direct role in the governance of the condominium building in question, although if they occupied positions on the board of directors the same conclusion might not be tenable. Accordingly, we find that status of the resident superintendents as owners and possessing the rights that flow therefrom under The Condominium Act (and the bylaws passed pursuant to section 10 of that legislation) does not in and of itself mean that they exercise managerial functions. The test must be whether their status as owners involves an independent decision-making function in regard to the management of the respondent's operations which might be compromised if they were placed in the bargaining unit and thereby potentially undermine the management of the building in question. In other words, in applying section 1(3)(b) the Board is concerned with significant conflicts of interest that might compromise the management of an employer's operations.

9. Applying this test to the resident superintendents, it can be said that their decision-making as unit owners may well be affected by their dual status as employees but because they are only two of 400 unit owners they are unlikely to affect or undermine the decision-making of the respondent corporation. Thus we would conclude that they do not exercise managerial functions as unit owners in any effective sense or in a way envisaged by section 1(3)(b) of the Act.

10. It is true that they do have access to confidential information and that this confidential information may, in the future, involve "matters relating to labour relations". However, section 1(3)(b) only applies to those "employed in a confidential capacity" in regard to such matters and the respondent admits that they are not so employed.

11. Therefore the resident superintendents are to be included in the bargaining unit.

. . .

14. A certificate will issue to the applicant.

7453-74-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. WESTEEL-ROSCO LIMITED (Respondent).

BEFORE: David H. Kates, Vice-Chairman, and Board Members F.W. Murray and E. Boyer.

DECISION OF THE BOARD: July 7, 1975.

1. This is an application filed by the respondent requesting reconsideration of a Board decision dated March 24, 1975 certifying the applicant for a group of carpenters and carpenters' apprentices in the employ of the respondent in The District of Thunder Bay.

2. The respondent requested that the Board's certificate be revoked in that at the relevant date of the application there were no employees in its employ falling within the description set out in the appropriate unit. Rather, it was suggested that on the date of the application the two employees appearing on the respondent's lists, namely, Mr. Sundell and Mr. Burton, were employed either as sheet metal workers or general labourers. The evidence is clear that these employees were hired through the applicant union's hiring hall in January 1975 when it was evident that the representative Sheet Metal Workers International Union, Local 397 could not supply the respondent with the necessary tradesmen for its Great Lakes Paper Project. For this purpose Local 397 issued the necessary work permits enabling two carpenters to perform sheet metal work on the project provided that an amount equal in dues was deducted from their pay cheques and forwarded to the Local. Afterwards the evidence indicates that these employees were assigned to the respondent's Tee-Kay Apparel project. Commencing on March 3, 1975 these employees were assigned to perform the carpentry work necessary for the construction of the hoarding around the building site. These employees also performed other

carpentry work such as trimming joists, framing windows and openings necessary to receive the metal siding on the project. It was agreed by the parties that on the date of the application the two employees concerned were involved in varying degrees in the construction of the hoarding. And it was further established that the skills necessary for the construction of the hoarding were not skills that would pertain to the sheet metal trade. Indeed, counsel for the respondent conceded that on March 10, 1975 the employees in question were engaged as carpenters for the purposes heretofore described.

3. The issue therefore confronting the Board is whether these employees, notwithstanding their duties and responsibilities on the date of the application, may be characterized as something else but carpenters or carpenters' apprentices. The thrust of counsel's argument was that these employees were initially retained to perform sheet metal work. Over a period of approximately eight weeks, a majority of their time was consumed in duties and responsibilities pertaining to that trade. Although the respondent conceded that the construction of the hoarding on the Tee-Kay Apparel project was carpentry work, it nevertheless was incidental to the main purpose of a project requiring the skills of an employee belonging to the sheet metal trade. The inevitable conclusion that the Board should therefore draw is that the employees, at all material times, were engaged in sheet metal work.

4. Counsel for the applicant indicated that the two employees on the respondent's lists were carpenters initially hired by the respondent to perform sheet metal work under a work permit provided by the Sheet Metal Workers local. The applicant was quite prepared to co-operate with the respondent for this purpose so long as the carpenters furnished were not performing carpentry work. As soon as the applicant learned that its members had been assigned by the respondent to construct the hoarding in the Tee-Kay Apparel project the applicant initiated the instant application for certification. In other words, at that particular time the employees were performing skills pertaining to the carpentry trade.

5. The Board, having regard to the representations of the parties, finds that the two

employees named herein were engaged in carpentry work on the date the application was filed. In reaching this conclusion the Board has not confined its investigation solely to the work performed on March 10, 1975 but notes that a week prior to filing of the application they were engaged principally in duties pertaining to the carpentry trade. In other words, as of the date of the application we find that a majority of the employees' time was engaged in work performed by carpenters and their apprentices. Furthermore, we hold it fallacious that because the construction of the hoarding around the building site is incidental to the main purpose of the project it necessarily follows that carpentry skills performed by employees for that purpose are likewise incidental and subservient to other features of the project. The evidence is undisputed that the construction of the hoarding and other preparatory work required carpenters applying the skills of their trade. And at the material time of the application we are further satisfied that the respondent engaged carpenters that fell within the bargaining unit description found appropriate by the Board in its original decision.

6. The respondent's application for reconsideration is therefore dismissed.

0476-75-U: ACOUSTICAL ASSOCIATION ONTARIO, J.A. MACDONALD (LONDON) LTD., LONDON ACOUSTICS LIMITED, CANADIAN JOHNS-MANVILLE LTD., W.J. BROOME PLASTERING LIMITED AND ACTPAR LIMITED (Applicant) v. Local Union 1316, United Brotherhood of Carpenters and Joiners of America; The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, The Ontario Acoustic and Drywall District Council, United Brotherhood of Carpenters and Joiners of America; John H. Walker, Business Agent, Local Union 1316; Tom Harkness, International Representative, United Brotherhood of Carpenters and Joiners of America; and Ken Marshall, President, Local Union 1316, United Brotherhood of Carpenters and Joiners of America (Respondent).

BEFORE: D.D. Carter, Vice-Chairman and Board Members
E. Boyer and J.E.C. Robinson, Q.C.

APPEARANCES AT THE HEARING: J. Liberman for the applicant;
R. Brandt for the respondent.

DECISION OF VICE-CHAIRMAN D.D. CARTER AND BOARD MEMBER
E. BOYER: July 7, 1975.

1. This an application by the Acoustical Association Ontario, and others, for a declaration that a strike called or authorized by Local Union 1316, United Brotherhood of Carpenters, and others, was unlawful.

2. Mr. R. Brandt appeared at the hearing for the respondents and requested the Board to adjourn the matter on the ground that the employees had returned to work. The applicants opposed any adjournment, indicating that they were fully prepared to present their case. The Board ruled that in these circumstances, where all of the respondents had been given proper notice, the request for the adjournment should be denied and that the Board should proceed to deal with the issue raised by the applicant. Mr. Brandt then indicated that he was not prepared to deal with the merits and withdrew from the hearing.

3. The following facts were presented at the hearing. A master agreement, dated March 14, 1972, had been entered into by the Acoustical Association, Ontario, (the association) and the Provincial Council of the United Brotherhood of Carpenters and Joiners of America (the union). This province-wide agreement dealt with certain terms and conditions of employment for the acoustical and drywall industry, but did not cover wages and welfare benefits, which were to be determined by local negotiation. A local agreement between the association and the union's Local 1316 was signed on February 1, 1974. This agreement was to be effective from February 1, 1974, to April 30, 1974, and subsequently until renewed.

4. In April of this year the parties commenced negotiations for the purpose of amending the local agreement. The parties met on four occasions without reaching agreement, and a further meeting was scheduled for June 16, at 9:00 a.m. At that point the parties had not resorted to the conciliation services under the Labour Relations Act. On the morning of the sixteenth, the Association was informed that "study sessions" had been called with the result that employees being employed by the applicant contractors were not on the job. On that same day the association received a telegram from Mr. John Walker, business agent for Local 1316, containing the following message:

"Study session of 1316 will continue liklihood that should 1946 place pickets on projects local 1316 will honour same."

When the employees did not report to work on the following day, the association sent a telegram to two of the union officials, John Walker and Tom Harkness, informing them that, if the men did not return to work next day, a back-to-work order would be sought. According to the testimony, Walker replied by telephone the next morning to the effect that, if the employer were to meet the union's wage demands, the men would be back on the job next morning. This condition was not met but, nevertheless, the employees returned to work by 12:30 p.m. on June 19. On June 23, the union indicated to the association that it was prepared to resume negotiations.

5. The applicants submitted that, on the facts presented, the Board could conclude that an unlawful strike had occurred. It was further argued that the strike was a method of bringing undue pressure on the contractors during negotiations, and amounted to bargaining in bad faith. Given these circumstances, the applicants argued that the board should issue a declaration in order that the conduct of the employer and other participants be punished.

6. This argument, however, is based on a misconception about the nature of the relief provided by s.82 of the Labour Relations Act. The board in exercising its discretion to grant a declaration under s.82 has not treated the declaration as a punitive measure but, quite the contrary, as a measure to encourage accommodation between bargaining parties. See Norfolk Hospital Association, [1974] OLRB Rep. 581. Collective bargaining often gives rise to situations where the line between legal and illegal conduct becomes blurred. In this type of situation, immediate recourse to criminal sanctions could be undesirable, creating the risk that the give-and-take of collective bargaining might be overshadowed by considerations of crime and punishment. The declaration performs the useful function of providing an authoritative determination on the legality of the conduct, without the application of criminal sanctions. The declaration may, of course, open the door to civil compensation under s.84, but this consequence is not relevant to this particular case where the applicants claim that a collective agreement is in operation. Aside from the effect of s.84, then, the declaration performs an admonitory function, and not a punitive function, providing a warning that the conduct in question contravenes the strike prohibition in the Act.

7. Given the function to be performed by the declaration, the Board has been reluctant to grant a declaration where a strike has been settled before the hearing of the application.

The reasons for this approach are fully explained in both Beatty Bros. (1965), 66 CLLC para. 16,049 and National Refractories (1963), 63 CLLC para. 16,276. The general thrust of these reasons is that, once the strike has disappeared, then, as a general rule, no useful purpose can be served by a determination of the legality of the activity. In other words, the declaration has been regarded as a procedure for preventing the continuation of strikes, and not as a procedure for a retrospective assessment of the legal position of one of the bargaining parties. To take this latter approach would create the danger that intervention by the Board might upset the settlement already reached. It must be recognized, moreover, that labour relations remedies should be applied selectively. If the Board were to grant the declaration as a general rule in cases where the strike has been settled, there is the very real possibility that the remedy will be far less effective in those cases where the strike is continuing. Over-usage is likely to debase the remedy, so that it will not be taken seriously in those cases where it is most needed. The Board's reluctance to grant the remedy, moreover, now serves as an incentive to end what might be an illegal strike. Once unions and employees receive notice of the application of the declaration, they know that, if there is an immediate return to work, there is a substantial likelihood that there will be no further intervention by the Board. Certainly, from an industrial relations perspective, this is a very desirable result.

8. There are some situations, however, where a declaration will be granted even though the strike is settled. Circumstances such as a past pattern of unlawful strikes or a reasonable likelihood that strike activity will recur have overridden the Board's reluctance to intervene once a strike is settled. Recently, in Norfolk Hospital Association, supra, the Board has added another exception, that is where the conduct in question has implications that extend beyond the immediate bargaining parties. In this type of situation, the declaration serves not only to warn the immediate parties but also to warn others in similar bargaining situations.

9. The facts presented by the applicants do not persuade the Board that it should grant a declaration in this case. The evidence indicates that the employees have returned to work and that the union is prepared to return to the bargaining table. There is no suggestion that further work stoppages will occur. The Board cannot agree with the applicants that the return to work was merely a device to avoid the Board's procedures and, thus, constituted an abuse of

process. If a work stoppage were to occur in the future, then there might be some evidence that the Board's processes were being abused. Until a past pattern of illegal work stoppages is established, however, the Board will not issue the declaration in the face of a strike settlement. The applicants, moreover, have not even attempted to establish that the conduct in question has implications that extend beyond their own collective bargaining relationship. Finally, if the applicants wish a retrospective assessment of the legal position of their respondents, they have an available avenue in the grievance and arbitration procedures of the collective agreement, which they claim to be in force.

10. Accordingly, for the reasons given above, the application is dismissed.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.: July 7, 1975.

I agree only that the decision of the majority correctly reflects the previous jurisprudence of this Board.

0244-75-R: Ontario Nurses' Association (Applicant) v. THE LAMBTON HEALTH UNIT (Respondent) v. Nurses' Association The Lambton Health Unit (Predecessor Trade Union).

BEFORE: David H. Kates, Vice-Chairman, and Board Members J.D. Bell and P.J. O'Keefe.

APPEARANCES AT THE HEARING: Robert McComb and Kay Lewis for the applicant; Alec Lovis Eddy for the respondent; no one appearing for the predecessor trade union.

DECISION OF THE BOARD: July 7, 1975.

1. This is an application under section 54 of The Labour Relations Act.

2. Having regard to the evidence, the Board is satisfied that on February 25, 1974 the predecessor trade union, in accordance with the terms of its constitution, merged with the Ontario Nurses' Association.

3. The issue raised by counsel for the respondent is whether the Board should exercise its discretion under section 54(2) to direct a representation vote. The choice extended the employees affected by this application would be whether they

wish to be represented by the Ontario Nurses' Association or by the Nurses' Association Lambton Health Unit, Local 19, Ontario Nurses' Association.

4. The circumstances precipitating the difficulties raised by counsel are relatively simple and straightforward. It appears that the notice to members of the predecessor trade union of the merger meeting to be held on February 24, 1974 alluded to the fact that once the merger had been effected and the predecessor ceased to exist, then the successor Ontario Nurses' Association would charter a Local Association of the Ontario Nurses' Association. This chartered association would then assume the administrative tasks of dealing with the employer for collective bargaining purposes. On March 1, 1974, at a meeting of the successor's Board of Directors, it was resolved to charter a local association for employee members of The Lambton Health Unit, and on April 25, 1974, a charter was assigned to the Nurses Association, Lambton Health Unit, Local 19. More particularly, the charter indicated:

"Now therefore let it be known that the Ontario Nurses' Association both subject to the conditions hereinafter provided, hereby grant this charter for the establishment and future maintenance of a chartered Local Association to be known as Nurses' Association Lambton Health Unit - Local 19 - Ontario Nurses' Association."

5. On May 29, 1974 the respondent was advised by a representative of the Ontario Nurses' Association of the merger between the predecessor and the successor and the subsequent chartering of Local 19. But more particularly it was indicated:

"The Ontario Nurses' Association is now seeking to acquire the rights, privileges and duties under The Labour Relations Act of the former nurses' association. There are two options available to accomplish this:

- (1) The employer by writing to us to grant O.N.A. voluntary recognition;

- (2) Applications can be made by the O.N.A. to The Ontario Labour Relations Board under s. 54(1) of The Labour Relations Act.

In the interests of a continuing, good relationship between the employer and the nurses' association, we are asking that you consider the first alternative. We also request that you honour the existing collective agreement between the parties.
..."

6. In reply the respondent, on July 7, 1974, wrote the applicant association:

"With reference to your letter of May 29, 1974, this is to advise that the Local Board of Health has agreed to grant voluntary recognition to the Ontario Nurses' Association as successor to the Nurses' Association of The Lambton Health Unit, and recognize that the O.N.A. has acquired the rights, duties and privileges under the Labour Relations Act which were assigned to the former nurses' association.

The Board of Health will continue to honour the existing collective agreement between the parties."

7. On December 27, 1974 the administrator of the respondent health unit was informed of the "new president of the Nurses' Association Local 19 ..." and the members of the negotiating committee who would be participating on the applicant's behalf in bargaining with a view to amending the collective agreement. It appears from the evidence that negotiations ensued and indeed a settlement of all outstanding issues had been achieved. Nevertheless, when it came to consummating a memorandum of settlement the respondent refused to sign with the Ontario Nurses' Association as the trade union party. The position taken by the respondent at that time was that it was dealing with a chartered association, namely, Local 19, as the exclusive bargaining agent for its employees.

8. Counsel argues quite forcefully having

regard to the evidence that as early as the date of the notice of the merger meeting on February 11, 1974 to the date of the filing of the instant application, a doubt should be discerned by the Board as to what was intended from the employee-members perspective by the merger proceedings as to which organization was to continue to represent their interests for purposes of collective bargaining. Furthermore, the ambiguity created by the applicant's internal machinations can only be dissipated by an order directing a representation vote between the present applicant and Local 19 as alluded to in paragraph 2 herein.

9. Counsel for the applicant argues that, although there may be some justification for confusion on the respondent's part, at the relative time of the merger meeting on February 25, 1974 a valid merger transaction occurred between the predecessor and the applicant. Anything that transpired thereafter is irrelevant to the legal conclusion the Board should arrive at in declaring the applicant the successor to the bargaining rights of the predecessor union. In any event, it was suggested that the chartered local created on April 25, 1974 was not a trade union within the meaning of section 1(1)(n) of the Act. Rather, what was created was only a chapter or a committee of the parent organization for administrative purposes. In other words, Local 19, it is asserted, is not an appropriate party for purposes of any representation vote that this Board may direct.

10. The Board, in considering the evidence and the representations of the parties in these proceedings, cannot agree with counsel for the respondent that on the date of the merger meeting an ambiguity existed with respect to the effect of the merger on those members who participated in those deliberations. Furthermore, it appears clear to this Board that the respondent itself quite clearly understood the effect of the merger as a result of notification thereof by the applicant on May 29, 1974. Indeed, to all intents and purposes the respondent voluntarily acknowledged the parent "Ontario Nurses' Association as successor to the Nurses' Association The Lambton Health Unit, and recognizes that the O.N.A. has acquired the rights, duties and privileges under the Labour Relations Act ..."

11. It appears to this Board that the problems that arose subsequent to the merger pro-

ceedings were precipitated by the representations made by elected officers of Local 19 as the properly constituted negotiating committee for the nurses employed by the respondent. However justified may be the respondent's concerns with respect to entering into a collective bargaining agreement with the appropriate trade union party, we agree with counsel for the applicant that that issue is irrelevant to the legal conclusion to be drawn from the merger. In short, the Board does not hold that there is any basis to conclude, especially in absence of any intervention in these proceedings by the employees affected, that they were misled or deceived by the merger proceedings. Counsel's request that a representation vote is therefore denied.

12. In arriving at the above conclusion the Board wishes it to be clear that it makes no finding as to whether the Nurses' Association, Lambton Health Unit, Local 19 is a trade union under section 1(1)(n) of the Act. And even if that association is a trade union, the Board makes no finding that there exists an obligation that the respondent need bargain with that organization with a view to entering into a collective bargaining agreement.

13. The Board therefore declares, pursuant to section 54(1) of The Labour Relations Act, that the applicant by reason of a merger has acquired the rights, privileges and duties of the Nurses' Association of The Lambton Health Unit which was the bargaining agent for a unit of employees of the respondent defined in a collective agreement between The Lambton Health Unit, dated March 8, 1973.

0455-75-U: WABASSO LIMITED, EMPIRE DIVISION (Applicant)
v. United Textile Workers of America, Local 155 (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES AT THE HEARING: K. W. Kort and L. J. Gifford for the applicant; R. Myslowka for the respondent.

DECISION OF THE BOARD: July 8, 1975.

1. This is an application for a declaration that the respondent called or authorized unlawful strikes by employees of the applicant on May 21, 1975 and June 9, 1975.

2. This application, with the consent of the parties, was heard at the same time as an application for a declaration that the employees concerned engaged in an unlawful strike on May 21 and June 9, 1975 (Board File No. 0454-75-U). The parties agreed that the evidence adduced should be applied to both applications.

3. The Board finds on the evidence that the respondent did not call the unlawful strikes referred to above and the only question remaining is whether the respondent authorized the strikes.

4. The evidence is that the applicant and the respondent were bound by the terms of a collective agreement at all material times. The Board finds that the evidence establishes that strikes within the meaning of section 1(1)(m) of the Act occurred on May 21 and June 9, 1975, and that these strikes were unlawful (Board File No. 0454-75-U).

5. On May 21 and June 9, the office employees of the applicant, who are in a bargaining unit represented by a sister local of the respondent, were engaged in a legal strike. On the days in question, the employees in the office bargaining unit had set up a picket line prior to the normal starting time for the employees represented by the respondent. When the latter came to the plant, they were asked by the office union pickets to respect the picket line and not to report in for work. The result was that on both occasions the overwhelming majority of plant employees did not report for work.

6. When the situation became known to the applicant on May 21, immediate steps were taken to contact the union representative, but without success. At 8:45 on that date, the applicant's Personnel Manager spoke to the union Executive Committee. The union President stated that he had been called at home and advised of the stoppage. He said that he had come into the plant and had spoken to the employees who were at the gates. Those to whom he spoke told him that the work stoppage would continue throughout the three shifts scheduled for that day.

7. Mr. Gifford, the Personnel Manager, advised the

union Executive that it was responsible for getting the people back to work and suggested that the Committee should set an example by returning to work itself. The Local Executive did not report for work on either May 21 or June 9. However, on May 21 the union Executive Committee, following its request, were given lists of employees and permission by the company to take time off to phone the employees in an attempt to get them back to work. On that date Ralph Muise, President of the Local, addressed some of the employees who were gathered outside the plant. The applicant's evidence is that Muise said to the employees that "the girls (i.e., the office workers) have asked you to honour the picket line--you may cross the picket line if you want to." Someone is reported to have shouted, "No way." Muise testified that in addition to addressing the group as a whole, he spoke to individual employees and told them to cross the picket lines and go to work. It was following his address to the employees that the lists of employees and permission referred to above were given to the union. The union Executive then spent the remainder of the day making phone calls to employees, but with little success. None of the Executive appeared at the plant during the shift changes.

8. The union Executive followed the same procedure with respect to phone calls on June 9 when the second strike took place. At that time, however, the Executive had not obtained the permission of the company to be absent in order to make the phone calls. They apparently assumed that the procedure, which was approved on May 21, would be acceptable on June 9, notwithstanding the fact that no specific permission had been sought from the company.

9. The evidence is that the Executive of the union were seen to be circulating among the employees congregating at the gates on both occasions. The representatives of the applicant who saw this action take place were unable to hear what was being said. Several of the Executive who testified, however, stated that they were circulating among the employees and advising them that the strike was illegal and that they should go to work. Some of the employees indicated that they were afraid to cross the picket line. The Chief Steward testified that he spoke to the Italian employees, told them that the strike was illegal and asked them to go back to work. The Recording Secretary said that he attempted to tell the employees that they did not have to honour the picket line and he urged them to go in to work. He stated that he felt it was his duty to urge the employees to go to work. He had no success, however, and left the scene to make phone calls to the employees.

10. Orval Roy, an employee with no office in the union, testified that he had been called on May 21 by the Chief Steward and told to go to work. He was also by Mr. Muise to go in to work. On that date he crossed the picket line, accompanied by some other employees. On June 9 he was again told by Ralph Muise and by Bruno Muise, another member of the Executive, to cross the picket line but he refused to cross it at this time and went home.

11. The Board has stated that there is a duty upon a trade union in the face of an illegal strike to make an honest and sincere effort to cause the employees concerned to return to work. A union which fails to make such an effort runs the risk of being found to have authorized the strike. It was the contention of the applicant that although the respondent took some steps towards ending the walk-out, the efforts fell far short of the requirements and that the conduct of the respondent amounted, in fact, to an authorization of the illegal strikes.

12. It is difficult to lay down norms of acceptable conduct on the part of a union which would be applicable in every instance of an illegal strike and each case must be dealt with, to a large degree, upon its own facts and circumstances.

13. In the present case, there is much weight to the applicant's argument that although the respondent took some steps to bring an end to the strike, it was not forceful and definite enough in its approach. The Board has given very careful consideration to the evidence, and while it is of the opinion that there was a degree of hesitancy and lack of example displayed by the union Executive, its action in a difficult situation involving a sister Local cannot be said to amount to a failure to make an honest and sincere effort to cause the employees to return to work. It is true that there appears to have been a certain timidity displayed by the Executive, but we do not believe that such timidity amounted to a lack of honesty and sincerity on the part of the Executive, some of whom we had the opportunity to hear testify. It is to be observed, in addition, that some employees did return to work as the result of the efforts of the Local Executive Committee, and what appears to have been timidity on the part of the Executive may well have been, as its counsel argued, the exercise of caution in a situation where excessive pressure might well have exacerbated the situation which remained throughout peaceful, although illegal.

14. In the result, and in the particular circumstances of this case, the Board finds that the evidence does not support the allegation that the respondent either called or authorized the strikes in question.

0292-75-R: The Association of Allied Health Professionals: Ontario (Applicant) v. THE ETOBICOKE GENERAL HOSPITAL (Respondent) v. The Civil Service Association of Ontario Inc. (Intervener) v. Employees (Objectors).

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members J.D. Bell and P.J. O'Keefe.

APPEARANCES AT THE HEARING: Michael Gordon and Cathy Bowman for the applicant; W.S. Cook and R. Miller for the respondent; Chris G. Paliare and Ivor Oram for the intervener; no one appeared for the objectors.

DECISION OF THE BOARD: July 8, 1975.

1. The applicant has applied to be certified as bargaining agent for all occupational therapists, physiotherapists, psychologists, psychometrists, social workers and dietitians in the employ of the respondent in the Municipality of Metropolitan Toronto, save and except Department Heads and persons above that rank.

2. In accordance with the usual practice of the Board, the applicant was notified that it must be prepared at the hearing conducted on June 2, 1975, to satisfy the Board that its organization is a trade union within the meaning of the Labour Relations Act.

. . .

4. It would appear that the respondent is a party to collective agreements with the Canadian Union of Public Employees and the Civil Service Association of Ontario Inc. There has been certification proceedings affecting other employees brought by the Ontario Nurses' Association and the Service Employees Union. The classification of employees who are not covered by the current collective agreement or affected by other certification proceedings include Occupational Therapist, Physiotherapist, Psychometrists, Social Worker, Dietitians, Recreationist, Medical Records Librarian, Discharge Planning Co-Ordinator and Pharmacist.

5. Based on the facts outlined above one might conclude that the applicant is here seeking a "tag-end" unit but by the description of the bargaining unit proposed by the applicant one could also conclude that this is an application for a "para-medical bargaining unit."

6. The constitution of the applicant outlines the classifications or group of employees who are qualified for membership. This constitution outline the following conditions for membership:

- "(a) Any professional member of the Health Care Team employed in a professional capacity other than a duly qualified doctor of medicine or a registered nurse, or nursing assistant; who is legally entitled to render treatment or care to the public as a member of a health discipline, is eligible for membership in this organization. For the purposes of clarity herein, it is understood that the "Health Care Team" as referred to herein, is composed of the following health professions:-

Physiotherapy, Occupational Therapy, Speech Pathology, Audiology, Dietitics, Remedial Gymnastics, Psychometry, Psychology, and Professional Social Work, and such other health professions as may be accepted as being a part of the Health Care Team by the Association membership. A professional member of the Health Care Team is a person who has qualified herself to practice one or more of the aforesaid health disciplines and who is eligible for membership in the professional Association pertaining to such discipline. It is understood that individuals who are members of such professions, and who are employees as defined in the Labour Relations Act, Ontario, as that statute may be amended from time to time, shall be entitled to apply for membership in the Association, and, subject only to subclause (c) herein, shall be entitled to be accepted by the Association as members.

- (b) No person who qualified for membership in accordance with the foregoing shall be refused membership in this organization or any of the rights, privileges or benefits of the same by reason of race, creed,

colour, sex, political views or affiliation, or place or county of origin.

- (c) An initiation fee of \$1.00 shall be charged to and be payable on acceptance to membership by an applicant for membership in the Association. Upon receipt by the Association of a completed application for membership from a person qualified for membership in the Association such person shall become a member of the Association.
- (d) Each member shall advise the Secretary promptly of any change of address and any notice or other communication given or sent by mail to any member shall be deemed to have been sufficiently given or sent if mailed to such person at the individual's last known address on file with the Association's Secretary.
- (e) For the purposes of clarity herein, all references to the feminine gender shall be deemed to be references to the masculine gender wherever the context applies".

7. The evidence adduced before the Board confirms the intention of the applicant to seek bargaining rights for what it now refers to as a unit of health professions which would exclude technicians and technologists.

8. It would appear that the applicant union has attempted to retain flexibility in respect to the qualifications for some classifications within a professional health group to qualify for membership. For instance, no action has been taken by the applicant to accept pharmacists for membership. Apparently, there is an intention to take appropriate action to confirm the qualification of this classification for membership even though qualification is not specified in the constitution. Such a situation could also be applied to a medical record librarian. In other words, there are classifications within a para-medical group who could become qualified for membership in the union. However, the terminology used by the applicant in its constitution does not permit membership for many classifications which would be included in either a tag-end unit or in a para-medical group (e.g. technicians).

9. The Board must conclude that based on the actions taken by the members of the applicant up to the date of hearing the applicant would be unable to represent certain classifications which would normally be in a tag-end bargaining unit or a para-medical bargaining unit. The bargaining unit which the

applicant seeks while representing a professional health group, would not satisfy the Board in respect to the recognition of a tag-end unit or the recognition of a para-medical bargaining unit. The bargaining unit sought by the applicant could create a situation where there can be substantial fragmentation of either a tag-end bargaining unit or a properly constituted para-medical bargaining unit.

10. The Board finds that the bargaining unit as proposed by the applicant is not appropriate and in view of the fact that the applicant, by the terms of its constitution is unable to represent employees who would be included in either a tag-end unit or a para-medical bargaining unit, the application must be dismissed.

7099-74-R: York University Staff Association (Applicant) v. YORK UNIVERSITY (Respondent) v. Group of Employees (Objectors).

BEFORE: D.H. Kates, Vice-Chairman, and Board Members P.J. O'Keefe and J.E.C. Robinson, Q.C.

DECISION OF THE BOARD: July 8, 1975.

1. Pursuant to the Board's endorsement of the record on June 4, 1975, the Examiner was instructed to prepare an Interim Report in connection with the issue of the community of interest, if any, shared by employees engaged in the respondents computer data processing department with employees included in the bargaining units proposed by the applicant and the respondent.

2. It appears that both applicant and respondent are basically in agreement that the appropriate bargaining unit ought to be described in terms of "all clerical, secretarial and technical employees including laboratory technicians." It further appears that the applicant and respondent agree that the employees comprising all classifications of the Electronic Data Processing Department (hereinafter referred to as "EDP classifications") should be included in the bargaining unit description proposed. The significant area of dispute between applicant and respondent pertains to the appropriate exclusions from the bargaining unit for reasons provided under section 1(3)(b) of the Act. Any finding made herein is without prejudice to respective positions taken by the parties in matters related to the status of persons as employees for purposes of the Act.

3. The issue before the Board is whether employees filling the respondent's "EDP classifications" ought to be excluded because they do not share a community of interest with employees occupying the proposed bargaining unit. The group of objectors argue by reason of work performed, conditions of employment, skills and an absence of functional coherence, or interdependence with the support staff, their inclusion in the unit is not warranted.

4. The respondent's Computer Service Department is located in several buildings at its Keele Street campus. The EDP department services both the academic and administrative functions of the university. The academic and administrative departments are organized into sub-departments with a director or administrator in charge of their management. On the administrative side the York Computer Services Department under the direction of Mrs. J.I. Murphy employs the bulk of the "EDP" employees who are disputed by the group of objectors. The evidence also indicates that "EDP classifications" are located under separate supervision at the respondent's Administrative Information Systems Department, The Institute of Behavioural Research Department, the Library and the Faculty of Arts. The Accounting Department and the Office of the Vice President also employ one data control clerk and one programmer respectively. Each supervisor including the Director of the Computer Services Department exercise a like discretion with respect to the operation of his department and each is also responsible to the Vice President or the Vice President of Administration, as the case may be, in connection with his department. Ultimate responsibility for all sectors of the University obviously falls on the shoulders of the President. Save for monies secured from independent sources for academic research, funding of the departments is obtained from the respondent's operating budget. In this regard employees' salary and other employment benefits are calculated and provided for from this source.

5. In a general sense the employees affected by the instant application are governed with respect to their terms and conditions of employment by university wide policy programmes. These policy programmes cover a wide spectrum of employee concerns including the hiring, promotion, evaluation, salary, discipline and discharge of employees. More particularly employees falling under the technicians grouping would be treated no differently than employees that fell into the clerical and secretarial categories. For example, key punch operator would share

the same job evaluation programme as a secretary or clerical assistant. Indeed, in the past year approximately four employees engaged in secretarial and clerical capacities have been transferred and/or promoted to EDP classifications. In effecting these changes job vacancies are posted in the university bulletin thereby conferring an opportunity for eligible candidates to apply for these positions. The evidence indicates that the skills of secretarial and clerical employees are very much akin to the skills required of the data control clerk and the key punch operator. Indeed, an employee once classified as an Administrative Assistant, Grade 8, Student Records, was promoted to a Programmer 2 Admissions. In other words there appears from a reading of the evidence a capacity for interchange amongst the various categories of employees included in the proposed bargaining unit. Of even greater significance to the issue before us however is that all of these personnel matters are administered and co-ordinated by the Department of Personnel Services. In short, there is a fundamental uniformity of terms and conditions of employment from a policy making perspective that affects all employees in the bargaining unit proposed by the applicant and the respondent.

6. To a limited extent there does appear some variation in the terms and conditions of employment that may affect "EDP classifications" generally and programmers particularly. For example, it is inherent in the nature of the duties and responsibilities attached to operating the computer that "EDP employees" be "on call" twenty-four hours per day. In this regard premium pay is attached to the pay cheques of employees who are assigned to evening and midnight shifts. Programmers because of their sophisticated training are not necessarily recruited through the normal channels of the central agency of the Department of Personnel Services. Many of the programmers are former students of the University who have complied with course requirements and have been hired by the respondent after graduation. The evidence also indicates that programmers from time to time are required to advise and instruct "EDP personnel" employed in sundry supportive capacities. In addition, because of the rather delicate information that employees in the "EDP" department are exposed to they are required to sign a "confidentiality agreement". Each signatory is bound to secrecy with respect to such information and any invention, innovation and improvement relating to the use and application of the computer during the course of employment remains the property of the respondent. Finally, it appears that programmers engaged in the Computer Services Department from time to time must deal with the respondent's

clients outside the university setting in order to explain or advise the client of the implications of a particular project. As a result of the particular factors described herein, the argument is submitted by the group of objectors that "EDP employees" do not share a community of interest with the balance of employees in the proposed bargaining unit.

7. In applications for certification involving employees engaged in university settings the Board has expressed its concern with respect to bargaining units that may lead to a proliferation of bargaining units that could otherwise be encompassed by one global unit. In other words the Board's disposition in such applications is to avoid undue fragmentation of bargaining units. (See for example: The York University Case O.L.R.B. M.R. April 1974 240 and the McMaster University Case O.L.R.B. M.R. February 1973 102). In this regard it is of some interest to note that this policy has been adopted by Boards in other jurisdictions. (see for example The Simon Fraser University Case 75 C.L.L.C. ¶16,145 [BC] and the Board of Governors of Mount Royal College 74 C.L.L.C. ¶16,120 [Alta]). For the Board to depart from these policy considerations we would have to be satisfied by compelling evidence that a particular group of employees do not exhibit any functional interdependence with employees who would otherwise be included in a wider unit. In this respect from an operational perspective we cannot conclude that the "EDP employees", particularly the key punch operators and the data control clerks, function autonomously and apart from secretarial and clerical employees engaged by the respondent university. From the standpoint of peculiar skills and particular working conditions the disputed employees are not sufficiently distinguishable from the balance of the employees in the proposed unit to justify their exclusion. The inevitable consequence of the objectors position would compel the Board to separate a variety of the other classifications of employees, such as laboratory technicians, who because of the peculiar features of their job duties, would be entitled to independent representation in a separate bargaining unit. In this respect the Board has often stated that the mere exercise of professional or technical skills in the performance of a employees' job will not in itself justify separate recognition for purposes of collective bargaining (see The Niagara Regional Health Unit Case O.L.R.B. M.R. April 1975 376, The Essex Health Association Case O.L.R.B. M.R. November 1967 716, The East York Public Library Case O.L.R.B. M.R. March 1971 120). We are not persuaded therefore that the special skills required by programmers in the performance of their duties justify treating them any

differently for collective bargaining purposes from the support staff upon whom they are both functionally dependent and operationally integrated.

8. The Board finds that a case has not been established to justify a finding that the employees engaged in the respondent's "EDP" Department do not share a community of interests with employees in the appropriate bargaining unit proposed by the applicant and the respondent.

7362-74-R: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. Wood, Wire and Metal Lathers International Union, Local 562 (Respondent).

VENDRASCO LTD., ET AL

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members F. W. Murray and P. J. O'Keefe.

APPEARANCES AT THE HEARING: L. A. MacLean, W. Stefanovitch, F. Hutnik and I. Logan for the applicant; A. M. Minsky and H. K. Weller for the respondent.

DECISION OF THE BOARD: July 9, 1975.

1. This is an application under section 52 of The Labour Relations Act for a declaration that the respondent trade union was not entitled at the time of entering into a collective agreement with Vendrasco Ltd. to represent the employees in the bargaining unit.

2. The applicant did not adduce any evidence in respect to its status for the purpose of two other employers who were named in the application. Therefore, the decision of the Board is confined to the validity of the collective agreement between the respondent and the one employer named above.

3. The onus rests on the respondent to establish that it was entitled to represent the employees of the company in the bargaining unit at the time the agreement between it and Vendrasco Ltd. was entered into on July 24, 1974.

4. Vendrasco Ltd. has had a long term bargaining relationship with the applicant as a result of its membership in the Windsor Construction Association. A collective agreement was entered into by the applicant and Vendrasco Ltd.

on July 19, 1973. This agreement was effective from May 1, 1973 to April 30, 1975. By the terms of this agreement an extensive work jurisdiction is acknowledged to be under the control of the members of the applicant who worked under that agreement. The work jurisdiction under this agreement contains repeated references to drywall construction work.

5. The agreement between the respondent and Vendrasco Ltd. outlines, by Article 15.03, the work jurisdiction which comes under that agreement. In analyzing and comparing the work jurisdiction of the two collective agreements, one finds a substantial overlap. Prior to July 25, 1974, Vendrasco Ltd. had had a long association with Local 439 of Wood, Wire and Metal Lathers International Union. The evidence confirms that the members of Local 439 became affiliated with the respondent local and, therefore, through the process of all voluntary recognition, Vendrasco Ltd. signed an agreement with the respondent local rather than continuing its bargaining relationship with Local 439 of the Lathers union.

6. When the agreement between the respondent and Vendrasco Ltd. was signed on July 25, 1974, there were two lathers in the employ of the company, both of whom were members of the respondent and performed work under the work jurisdiction of the Local 562 agreement.

7. On July 25, 1974, there were carpenters employed by Vendrasco Ltd. who performed work under the work jurisdiction outlined in the collective agreement with the applicant. In fact, a substantial amount of the work included within the work jurisdiction under the collective agreement with the respondent was being done by the carpenters. This work had been done for many years. One must assume, therefore, that through the process of voluntary recognition the respondent union and Vendrasco Ltd. entered into a collective agreement which contains a substantial expansion of the work jurisdiction which had been included in the previous collective bargaining relationship between Vendrasco Ltd. and Local 439 of the Lathers union. As a result of this expansion of the work jurisdiction in the agreement entered into through voluntary recognition, we have a situation where members of the applicant union continue to perform work which is covered by the work jurisdiction of both agreements.

8. The evidence clearly discloses that there must have been at least two carpenters who were performing work within

the work jurisdiction of the respondent's agreement with Vendrasco Ltd. at the time it was signed. Based on this fact, the respondent has not discharged the onus imposed on it to establish that it represented a majority of the employees of Vendrasco Ltd. who performed work in the bargaining unit, as defined by the work jurisdiction, on July 25, 1974, when the agreement was signed.

9. The Board accordingly declares that the respondent union was not entitled to represent the employees in the bargaining unit at the time when it entered into the agreement with Vendrasco Ltd.

7370-74-M: Canadian Union of Operating Engineers, Local 101 (Applicant) v. ONTARIO HYDRO (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members E. Boyer and F. W. Murray.

APPEARANCES AT THE HEARING: V. McManus, P. Nugent and D. McGregor for the applicant; K. W. Kort and J. H. Kirwin for the respondent.

DECISION OF D. H. KATES, VICE-CHAIRMAN AND BOARD MEMBERS
F. W. MURRAY. July 15, 1975.

1. This is an application filed by the trade union under section 95(2) of the Act where a question has arisen as to whether four of the respondent's employees exercise managerial functions within the meaning of section 1(3)(b) of the Act. Upon receipt of the application, The Labour Relations Officer was authorized "to inquire into and report back to the Board on the changes in the duties and responsibilities of the following persons since the effective date of the subsisting collective agreement between the parties hereto; namely, W. Lynch, W. Ellsworth, B. Marchand and R. Worth.

2. Commencing in 1973 the respondent began a programme of re-organizing and streamlining its maintenance department at its R. L. Hearn Generating Station with a view of increasing productivity in the generation of hydro-electric power. Without detailing the technical measures taken to transform the operations of the generating station, it was intended that the plant operate on a twenty-four hour basis, seven days a week. Before the changes were introduced the plant operated on a regular shift basis,

five days a week. As a result of these changes and having regard to the ultimate purpose of the measures taken to effect the changes, it was the respondent's intention ultimately to introduce three eight hour shifts to maintain the generator on "an around the clock basis." For this reason it became necessary for management to redeploy plant personnel accordingly and to increase its supervisory staff to oversee their job performance. The evidence indicates that new job classifications were created and were designated as "Shift Mechanical Maintenance Foreman" and "Shift E & I Maintenance Foreman" in order to reflect the essentially shift nature of the positions. Recruitment of personnel to perform the duties and responsibilities attached to the newly created positions were made from both within and outside the respondent's work force. The employees who are presently disputed by the parties were classified as "crew foremen" under the former operation and were promoted to the shift foreman's position on January 2, 1975.

3. There is no dispute that these employees while classified as "crew foremen" were covered under the subsisting collective agreement between the respondent and the applicant and there is also no dispute that the "crew foremen" exercised supervisory functions tantamount to the duties exercised by a "lead hand". The issue before us is whether because of the measures taken with respect to reorganizing the respondent's operations at its R. L. Hearn Generating Station a substantial change in the duties and responsibilities of the disputed employees has occurred to justify a finding that they exercise managerial functions for purposes of section 1(3)(b) of the Act. In this regard the position taken by the respondent is that the duties attached to persons filling the newly created classifications are the same as "the management foreman's job," described under the exclusionary terms of the collective agreement referred to. In addressing ourselves particularly to that position the Board wishes to emphasize that no representation was made to us in connection with the functions of "the management foreman's job" being consistent with the exercise of managerial functions for purposes of section 1(3)(b) of the Act. In other words, the Board in resolving the question is not applying the evidence to the bargaining unit description under the collective agreement but to the relevant provisions of The Labour Relations Act.

4. In reviewing the evidence contained in the Labour Relations Officer's Report the Board finds that the un-rebutted evidence supports a conclusion that a substantial

change in the duties and responsibilities of persons once classified as "crew foreman" has occurred to satisfy us that they are no longer employees for purposes of the Act. In this regard we find that the representations of the applicant do not support its position that no substantial change has transpired to justify the conclusion that the disputed employees do not exercise managerial functions. In this regard it was conceded from the outset that "the crew foreman" exercised functions that may accurately be characterized as supervisory in nature. While exercising these supervisory duties, however, the crew foreman was to all intents and purposes answerable to the first line supervisor, namely the manager foreman. Upon promotion to the positions of "Shift Mechanical Maintenance Foreman" and "Shift E & I Maintenance Foreman" the evidence indicates that that limitation to the exercise of independent managerial discretion has been removed. We agree to a limited extent that in a real sense the functions of "the crew foreman" have changed imperceptibly with respect to the supervisory duties heretofore exercised. What has changed significantly is his capacity to exercise a discretion in the performance of those duties that are consistent with the functions of a foreman traditionally excluded from a bargaining unit because of the exercise of duties contemplated by section 1(3)(b) of the Act. And in this respect the shift foreman has been equipped to exercise decision making functions at the plant level consistent with the requirements of a supervisor of employees engaged in the type of shift work contemplated by the respondent's programme for re-organization. In other words, "the crew foreman" has been elevated to the foreman's position in its industrial context. (The Falconbridge Nickel Mines Ltd. case OLRB M.R. September 1966 367).

5. The Board notes that the introduction of the maximum number of shifts contemplated by the respondent has yet to occur as of the date of the instant application. Nevertheless, the disputed employees since the date of their promotion have exercised their duties as foremen over extended work shifts and during the week-end. More particularly with respect to their functions as "foremen" we note that they no longer perform bargaining unit work. In addition to their regular supervisory duties which heretofore included powers to assign work, grant overtime and time off, approve time sheets, they also prepare evaluation reports intended to be applied by management to measure employees' work progress. In addition, the foreman is required to investigate for potential abuse employees who have claimed sick leave credits. As a result of his investigation he may

pass his report on for possible reprimand by management or he may simply determine that further action is unwarranted. Discretion may be exercised with respect to the purchase of supplies to the limits of \$500.00. The foreman attends management meetings where matters pertaining to employees' terms and conditions of employment are discussed. In this respect it was indicated that the foreman may recommend the hiring, firing and disciplining of employees over whom supervisory functions are exercised.

6. The Board therefore finds that the persons referred to in paragraph one herein exercise managerial functions for purposes of section 1(3)(b) of the Act and therefore since January 2, 1975, have ceased to be employees for purposes of the Act.

DECISION OF BOARD MEMBER E. BOYER: July 15, 1975.

1. I disagree.

2. I would have ruled the changes to the functions of the crew foreman, if any, were insignificant to the extent of affecting their employment status for purposes of the Act.

0202-75-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Hotel and Club Workers Division, Local 351 (Applicant) v. PRINCE HOTEL (TORONTO) LTD. (Respondent).

BEFORE: Frank V. Boscarior, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

APPEARANCES AT THE HEARING: A. M. Minsky and K. Coutlee for the applicant; Robin B. Cumine and Leo George for the respondent.

DECISION OF THE BOARD: July 16, 1975.

1. Pursuant to the respondent's reply dated May 14, 1975, to this application and to its letter dated June 9, 1975, the respondent alleges that the application, in the circumstances, is a nullity and that, in any event, the applicant should be required to explain its reasons for requesting the withdrawal of its earlier application filed with the Board.

2. The relevant facts, we find, are as follows: On April 7, 1975, the applicant filed an application for certification requesting the taking of a pre-hearing representation vote with respect to the same employees subject to the instant application (Board File No. 0033-75-R). Following the two meetings of the parties as convened by the Labour Relations Officer on April 18 and April 30, the applicant by letter dated May 2, 1975, requested leave of the Board to withdraw that application. On May 2, 1975, the applicant also filed the present application. It was not until May 6, 1975, however, that the Board issued its decision with respect to the applicant's request to be permitted to withdraw its earlier application, at which time the Board dismissed that application. It should be further noted that the instant application was filed after the terminal date of the initial application which was April 16, 1975, and that no representation vote had in fact been ordered by the Board in the latter proceedings until May 26, 1975.

3. At the hearing of this matter on June 30, 1975, counsel for the respondent did not pursue the "nullity" aspects with respect to his original submissions, but rather, he indicated that in the circumstances there was an onus of explanation cast upon the applicant to demonstrate why the Board should entertain the second application. In this regard, he argued that both the Board and the respondent had been put to great effort in the former proceedings and that a further meeting had been scheduled for May 9, to settle the final arrangements for that vote. In the absence of any such explanation, it is the respondent's position that the Board in the circumstances could infer that the initial application was not made seriously and in good faith such that the Board should now refuse to entertain the present application.

4. In this regard, counsel for the respondent suggested that we should now bar the applicant having regard to the principles as set out in the Patchoque Plymouth Hawkesbury Mills case (1972) O.L.R.B. Rep. 747, where at page 749, the Board stated:

"In almost every instance where the Board has imposed such a bar, a representation vote has been directed and conducted even though the ballots may not have been counted, see, for example, The Stanley Steel Co. Ltd. case OLRB Rep. February 1972, p. 181. Where the

Board has directed a representation vote and a trade union requests leave to withdraw its application for certification before the representation vote is conducted, the Board has in the past dismissed the application for certification and has not imposed a bar to further applications but has drawn the attention of the parties to the principle enunciated in the Mathias-Ouellette case, 56 CLLC para. 18, 026, C.L.S. 76-845. This principle places the burden on the applicant of showing why the Board should entertain a subsequent application for certification by the same trade union with respect to any of the employees affected by the earlier unsuccessful application for certification. A third example of the type of situation where the Board has imposed a bar is to be found in the J.W. Crooks Co. case OLRB Rep. February 1972, p. 126, where a trade union made four unsuccessful applications for the same unit of employees in a period of a little more than three months."

5. The relevant principles affecting an application for a pre-hearing representation vote in these circumstances are set out in the Practice Note No. 7 of the Board's Rules of Procedure where at page 147, appears the following:

"5. Where, on application for a pre-hearing representation vote, after an examiner, has been appointed and has met with the parties, an applicant requests leave to withdraw its application, the Board in its endorsement has noted the request to withdraw and has dismissed the application. See Lake Simcoe Ice & Enterprises Ltd. case, OLRB Monthly Report, June 1963, p. 159.

6. Where a request for leave to withdraw is made by an applicant after a vote has been directed, the Board has dismissed the application, and in its endorsement has drawn the attention of the parties to the decision of the Board in the Mathias-Ouellette case [1955] CCH Canadian Labour Law Reporter, Transfer Binder '55-'59 para. 16,026 C.L.S. 76-485."

6. Having carefully reviewed the principles as set out above together with those as expounded in the General Freezer Ltd. case 63 CLLC 1219, para. 16,294, Hi Way Market Ltd. case OLRB M.R. May 1968, p. 155 and the Watson Manufacturing Company of Paris Limited case OLRB M.R. August 1968, p. 441

and applying the provisions of section 92(3)(b) and 91(1)(1) of the Labour Relations Act, we find that there is no onus of explanation cast upon the applicant in these circumstances.

7. Accordingly, Mr. B. Abes is directed to proceed with his enquiry as initially authorized by the Board in its decision in this matter dated May 26, 1975.

0205-75-R: Canadian Textile & Chemical Union (Applicant) v. HARDING CARPETS LIMITED (Respondent) v. The Canadian Union of Operating Engineers, Local 104 (Intervener #1) v. Textile Workers' Union of America, C.L.C./A.F.L./C.I.O., South-Western Ontario Textile Joint Board and its Local 741 (Intervener #2).

BEFORE: George W. Adams, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

DECISION OF THE BOARD: July 16, 1975.

1. This is an application for certification.

2. By decision dated May 27, 1975 the Board made the following findings in regard to the appropriate bargaining unit:

"The Board further finds that all employees of the respondent at its Guelph plant, save and except foremen, assistant foremen, those persons above the rank of foreman and assistant foreman, fixers, quality control staff, office staff, those employees who do not work more than 5 hours per day, employees covered by a subsisting collective agreement between the respondent and The Canadian Union of Operating Engineers, Local 104 and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

In coming to this immediate preceding decision the Board had regard to the fact that the above described bargaining unit is that bargaining unit subject to a collective agreement between the respondent and the incumbent intervening trade union, the Textile Workers' Union of America, South-Western Ontario Joint Board, Local No. 741 (hereinafter referred to as "Local 741"). A letter of agreement between the respondent and Local 741 dated September 5, 1974 describes part-time workers as "those working out

more than 5 hours per day". The Board's practice is to describe such employees as employees regularly employed for not more than 24 hours per week but it is also the Board's practice to require the applicant union to accept as a voting constituency the unit represented by the incumbent for the purposes of a representation vote. Moreover, in terms of total working hours per week, there would appear to be very little difference between the two descriptions.

In Roland Lefebvre Lathing Limited [1966] OLRB M.R. May p. 140 the Board noted that in such circumstances, the bargaining unit as ultimately set out in the Board's certificate may differ from the voting constituency. Paragraph 7 of that decision reads:

"Where an applicant union seeks to displace an incumbent union and on its application proposes a bargaining unit which differs from the bargaining unit in the collective agreement between the incumbent union and the employer, the Board sets up a voting constituency in the terms of the bargaining unit described in the collective agreement. If the applicant union wins the vote the Board, in describing the bargaining unit in the certificate issued to the applicant, will take into consideration the representations of the parties as to how that unit should be described. In other words the bargaining unit as ultimately set out in the Board's certificate may differ from the voting constituency."

Accordingly, if the applicant wishes to raise this matter again, should it win the representation vote, the Board will reconsider the request at that time."

3. In that same decision the Board directed a representation vote and voters were to be given a choice between the applicant Canadian Textile & Chemical Union and the intervener Textile Workers' Union of America, C.L.C./A.F.L./C.I.O., South-Western Ontario Textile Joint Board and its Local 741.

4. The vote was taken on June 19, 1975, and June 30, 1975 was set as the last day for filing statements of objections.

5. By letter dated June 25, 1975 the Board received a letter from a representative of the Canadian Union of Operating Engineers, Local 104 requesting that "the poll be reopened so that the six remaining votes which were not cast may now be cast, and the Board base its decision on the total vote".

6. This request is denied. No representative of the Local 104 attended the hearing convened by the Board and in defining the appropriate bargaining unit by excluding "employees covered by a subsisting collective agreement between the respondent and The Canadian Union of Operating Engineers, Local 104" the Board was following its usual practice in displacement applications. Any status that trade union has in this matter was protected by this decision and its status in this matter is limited to that determination. It therefore has no right to make the request that has been made.

However, it can be observed that the request is totally without merit in any event. The fact that six employees decided against casting a vote in what turned out to be a very close count cannot be a reason for holding another representation vote. Section 7(3) directs the Board to certify the trade union favoured by more than fifty per cent of the ballots cast.

7. There being no other objections, and having regard to the fact that the Returning Officer's Report reveals that more than fifty per cent of the ballots cast were cast in favour of the Textile Workers' Union of America, C.L.C./A.F.L./C.I.O., South-Western Ontario Textile Joint Board and its Local 741 (intervener #2), the application is dismissed.

7365-74-R: Teamsters Union, Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. LIVINGSTON TRANSPORTATION LIMITED (Respondent) v. International Woodworkers of America (Intervener).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES AT THE HEARING: I.J. Thomson and Don Swait for the applicant; T.F. Storie and Wm. Johnston for the respondent; no one appearing for the intervener.

DECISION OF THE BOARD: July 16, 1975.

1. This is an application for certification.

. . .

3. The applicant has applied to be designated as the exclusive bargaining agent for "all employees of the respondent company working in or out of Metropolitan Toronto save and except foremen, those above the rank of foreman, office staff, supervisors, persons under separate contract with the company and referred to as owner-operators (brokers) and those covered by an existing collective agreement with the International Woodworkers of America".

4. The intervener filed a collective agreement between itself and Livingston Mutual Warehousing Limited dated May 10, 1974 and made reference to a memorandum of settlement that was said to set out terms of a collective agreement between itself and the respondent.

In fact the Board was told that a formal collective agreement had been entered into on March 6, 1975. However, the intervener did not claim bargaining rights for the employees subject to this application and therefore the normal exclusion making reference to a collective agreement between the intervener and respondent will accommodate the intervener's interest in the application.

5. The respondent objected to the exclusion of "persons under separate contract with the company and referred to as owner-operators (brokers)" and submitted that these persons were employees and, according to the Board's jurisprudence, ought to be included in the bargaining unit. The respondent agreed that there was no basis for excluding "sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" in the circumstances and accordingly the respondent's proposed bargaining unit was "all employees of the respondent employed at and working out of its terminal on Horner Avenue in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting agreements with International Woodworkers of America".

6. The applicant took the position that the so-called brokers or owner-operators were not employees but

were independent contractors and, alternatively, submitted that if they were employees their community of interest did not reside with the other drivers and thus their exclusion would be appropriate.

7. The Board appointed an examiner.

8. However, the parties agreed the following statement of fact that requested an opportunity to make representations to the Board.

"For the purpose of clarity owner-operators employed by the Respondent shall be referred to as "brokers" herein and other persons not under individual contract with the Respondent shall be referred to as "drivers"."

This statement of fact was arrived at pursuant to a decision of the Labour Relations Board dated April 2nd, 1975 appointing Mr. L. Stickland as an Examiner to "... inquire into the list of employees filed by the respondent and into the appropriateness of the bargaining unit with particular reference to the duties, responsibilities and nature of employment of such persons designated by the applicant as 'owner-operators' and to report back to the Board.".

"1. The Respondent, Livingston Transportation Limited, is a common carrier engaged in hauling freight throughout Ontario and for the purposes of this Statement of Fact operating from its terminal at 137 Horner Avenue in Metropolitan Toronto. It has been operating from this location for approximately one and one-half years utilizing certain "C" P.C.V. authority to transfer goods in and out of Toronto to points in Ontario and to make local deliveries pursuant to a Toronto cartage licence held by the Respondent. It maintains a dispatch office at 137 Horner Avenue and loads are dispatched by the same individual to both brokers and drivers.

2. At the date of Application for Certification before the Labour Relations Board on February 26, 1975 the operations involved the employment of those persons whose names are set out in Schedule A attached hereto. Schedule A designates the status of such persons as either driver or broker respectively.

3. Those persons designated on Schedule A as brokers have executed individual contracts during the period May 1974 to February 1975 inclusive in the form attached as Schedule B hereto. With the exception of one broker, Wilson T. Petro (who was originally employed as a driver by the Respondent before executing a broker contract in September of 1974) the balance of persons designated as brokers in Schedule A were initially employed as brokers.

4. The tractors used by the brokers pursuant to their contracts are beneficially owned by them and any financing or lease obligations are solely those of the broker with the exception of W. Ewels and B. Ridout, both of whom purchased their tractors from the Respondent. Ewels and Ridout are currently making weekly payments to the Respondent with respect to the outstanding balances owed by them for the purchase of their tractors.

5. The brokers' tractors carry the Respondent's name and are registered in the name of the Respondent with the Ministry of Transportation and Communications both for Commercial and P.C.V. registration purposes. This is done to allow the brokers to operate under the P.C.V. licences held by the Respondent and the beneficial ownership of the tractors remain with the respective brokers with the exception of Ewels and Ridout.

6. The tractors are normally painted in the fleet colours of the Respondent within thirty days of execution of the broker contract and in accordance with its provisions. The tractors operated by the brokers are parked at their own expense at locations arranged by them and while there is no requirement that their units be left at the Respondent's Toronto depot they are, as a matter of practice, parked there.

7. The brokers pay for and are responsible for all fuel, maintenance and repairs of their tractors including either on or off the road expenses. The Respondent does not have a gasoline licence at its Toronto terminal and therefore no fuel is purchased by the brokers from it.

8. Drivers and brokers are assigned to city and highway work. At all material times with the exception of a period commencing approximately March 3, 1975 there has been sufficient business to keep brokers and drivers fully employed.

9. The Respondent has published rules and regulations, a copy of which is attached hereto as Schedule C that have equal application to drivers and brokers subject to any specific provisions of the broker contracts.

10. Where the brokers seek to substitute drivers in the operation of their tractors the Respondent has the right to and does satisfy itself as to the qualifications and ability of such substitutes through testing both for insurance purposes and compliance with paragraph 5 of Schedule B.

11. Both brokers and drivers deliver customers' goods according to a delivery schedule prepared by the Respondent reflecting customer requirements. In the case of brokers, they alone are responsible for any loss, damage or shortage of freight. Both brokers and drivers are covered by insurance in the Respondent's name and purchased by it on a fleet basis. The brokers are charged for the respective pro rata share of such insurance.

12. Brokers are paid solely on the basis of a percentage of revenue received by the Respondent for the haulage of freight and are not eligible for overtime pay. Payment is made to brokers on a weekly basis less expenses deducted by the Respondent for such things as their respective commercial licence registration, P.C.V. plates, insurance and other related matters. Drivers employed by the Respondent are paid on a bi-weekly basis based either on hours worked or miles driven or a combination thereof with no deductions for those matters relating to brokers above. Drivers are eligible for overtime pay.

13. Brokers are not covered under any unemployment insurance scheme by the Respondent nor does the Company deduct monies for income tax purposes. Participation in such coverage is solely the responsibility of the broker as is the case in regard to Canada Pension Plan, group insurance,

related fringe benefits including vacation pay and statutory holidays and Workmen's Compensation although the Respondent requires coverage of the broker under the latter. Drivers are provided with coverage by the Respondent under a group insurance plan, Ontario Health Insurance Plan and are additionally eligible for fringe benefits including vacations with pay and statutory holidays.

14. To date, the brokers have driven exclusively for the Respondent and while there is no specific contractual requirement failure to make themselves available to the detriment of the Respondent's customers would be a basis for termination of the contract by the Respondent along with the removal of its P.C.V. plates. At the same time, there is no restrictive covenant between the broker and the Respondent precluding any competition by the broker should the relationship be terminated. Other conditions of employment between the broker and the Respondent are in accordance with the contract attached as Schedule B hereto.

15. Neither the brokers nor the drivers are provided with or required to wear uniforms.

16. In accordance with the several contracts executed between the brokers and the Respondent either party may terminate the agreement on thirty days' notice for any cause.

17. Neither drivers nor brokers are required to solicit business for the Respondent and their remuneration is in no contingent upon business obtained by them.

18. Schedule B is identical to the form of broker contract that was utilized by the Respondent in its operation at St. Thomas, Ontario (except as to the method of remuneration) and was the subject matter of a series of hearings before the Ontario Labour Relations Board (Board File No. 854-71-M, etc.) in similar proceedings."

9. At the outset of the hearing convened to hear the representations of the parties the applicant agreed that the persons in question were employees and thus confined its argument to the issue of the appropriate unit in the circumstances. In contending that separate bar-

gaining units would be appropriate the applicant's position is best set out in its letter to the Board dated May 7, 1975. This letter reads, in part:

"We submit there is no similarity between the two classifications (owner-operators and drivers). The Board will note that with the exclusion of one individual, Wilson T. Petro, all the other brokers were hired as brokers and have continued that relationship with the company over the period of time and have separate signed contracts with the company.

On Page 5, Paragraph 12 sets out the basic difference between the two groups as far as pay is concerned and brings out the different relationship between the two groups. Paragraph 13 further strengthens our proposal for separate units. The company made such of the fact at the hearing before the Board that this issue had been determined by the Board in a previous case (Board File #854-71-N) and that the Board in that instance had ruled that these people were employees for the purposes of the Act. In that case the brokers at St. Thomas were paid mileage exactly the same as the employees but in the instance here the brokers are paid a percentage of the revenue received for their particular work while the employees receive mileage rate, hourly rate and overtime.

If they were both included in the one unit it would be an impossible situation for a negotiator who would be negotiating for hourly and mileage rates and other benefits for one group and a contract being already in existence between the respondent and brokers on a percentage basis for others.

Finally we urge the Board not to put these two groups together and the Board will note that the Canada Labour Relations Board and British Columbia Board place the two groups into separate units because of their different interests.

Lastly, we know that the brokers will not support the position of the employees for a union and since the number of brokers is in excess of the number of employees you will deny the right of the "employees" to union benefits if you accept the submission of the respondent."

10. On the other hand, the respondent referred the Board to the principles that are normally applicable in such determinations and submitted that there was scant reason for separate bargaining units.

11. We agree with the parties that the brokers or owner-operators are employees for the purposes of the Labour Relations Act. This Board has often had to make determinations in the legal shadow land between undisputable entrepreneurial and employment statuses. And in making these determinations the Board applies a complex of considerations intended to ascertain whether the persons in question are in business for themselves or whether their relationship with another person more closely resembles the relationship of an employee than that of an independent contractor. These considerations have been detailed elsewhere. (See Hamilton Trucking Limited [1971] OLRB Reps. 237; Livingston Transportation Limited [1972] OLRB Reps. 488; Agilis Corporation Limited [1971] OLRB Reps. 232; Erb Transport Limited [1972] OLRB Reps. 388; Michael Rosen Real Estate Limited [1972] Reps. 766; Shell Canada Limited [1974] OLRB Reps. 200; Gulf Oil Canada Limited [1974] OLRB Reps. 245; Re Becker Milk Co. Ltd. (1973) 1 L.A.C. (2d) 337 (Carter). And see generally Arthurs, The Dependent Contractors: A Study of The Legal Problems of Countervailing Power (1965) 16 U.T.L.H. 89. For the American jurisprudence see The Seven-Up Bottling Co. of Detroit Inc. 120 NLRB 1032; Golden Age Dayton Corporation 124 NLRB 916.)

12. Thus the Board is left with the issue of the appropriate bargaining unit in the circumstances. The applicant has submitted that there is no similarity between the two classifications (owner-operators and drivers) and distinguished this case from the earlier Livingston Transportation Limited case in that "the brokers at St. Thomas were paid mileage exactly the same as the employees but in the instance here the brokers are paid a percentage of the revenue received for their particular work while the employees receive mileage rate, hourly rate and overtime". Its letter goes on to contend that (1) the inclusion of the brokers in the bargaining unit would confront negotiators with an impossible problem; (2) the British Columbia and Canada boards place the two groups into separate units because of their different interests; and lastly (3) because the brokers will not support the position of the employees for a union and since the number of brokers

is in excess of the number of employees, to include them in the same unit will deny the right of the "employees" to union benefits.

13. While section 3 of the legislation stipulates that every person is free to join a trade union of his own choice section 6 imposes an obligation upon the Board to determine a unit of employees that is appropriate for collective bargaining. The Board's decision-making in regard to the appropriate unit therefore has an impact upon a person's freedom "to join a trade union of his own choice and participate in its lawful activities", if the latter phrase is meant to include representation by a trade union for collective bargaining purposes. Harmonious collective bargaining, an aspiration declared in the preamble to the legislation, requires a viable unit of employees upon which to build. A narrowly defined unit may ignore the functional coherence of the work place resulting in jurisdictional disputes and administrative nightmares. Too narrow a unit may deprive employees of any real bargaining power, and at the same time may leave them with insufficient room to negotiate innovative and comprehensive benefit systems, a result which could convert collective bargaining into an illusory process. On the other hand, too comprehensive a unit can also result in administrative difficulties. Moreover, a policy that would place employees with widely differing interests in the same bargaining unit would deprive many employees of all the benefits of collective bargaining legislation. Accordingly labour relations boards have had to strike a balance somewhere in between these two extremes. (See Jones, Self-Determination vs. Stability of Labour Relations (1960), 58 Mich. L. Rev. 313; Chamberlain, Collective Bargaining (1951) c. 8, 9; Herman, Determination of the Appropriate Bargaining Unit (1966).

14. Because of the presence of these conflicting values the decision-making has resulted in a checklist of principles and policies of differing weight. But the weight attributed to any one consideration is very much dependent upon the nature of the industry in which specific parties operate.

15. This is not to deny that specific rules exist to resolve most cases. Because the parties needed more certainty and predictability than these general principles and policies could provide labour relations boards, by way of adjudication, have laid down more or less arbitrary rules that describe the

vast majority of bargaining units in the industries they regulate. As a result of these administrative rules the standard production, office and craft units have come to exist.

16. But applications continue to be brought that challenge the standard units and require recourse to the more amorphous policies and principles set out of which the standard units were created. This application is such an occasion.

17. One of the most prominent of these general considerations is the community of interest among employees. This phrase attempts to capsulize the cohesiveness of a group of employees for the purpose of collective bargaining and in applying the test labour boards have regard to the nature of the work performed; the conditions of employment; the skills of employees; the administration and supervision of the employment relationship; geographic circumstances; and the functional coherence and interdependence of the job functions under consideration (Usarco Ltd. [1967] OLRB Reps. Sept. 526).

18. The drivers and the owner-operators are dispatched from the same location, perform the same kind of work and possess identical skills. Further, they are subject to the same rules and regulations, and operate within identical geographic limits. On the other hand owner-drivers own their own vehicles and this has resulted in a very different method of payment—a percentage of the revenue received by the respondent for the haulage of freight. And it is this fact upon which the applicant's argument is based. Because of the method of payment to the owner-operators at the present, they are not concerned with overtime and do not participate in any of the fringe benefits that apply to the drivers. Moreover, they are responsible for the maintenance of their vehicles and for the costs associated with the licensing and insurance requirements of the industry. Presumably these differences cause the applicant to claim that their inclusion in the bargaining unit would make negotiations impossible.

19. The Board was not provided with the kind of evidence that might support this claim. The owner-operators did not intervene and were not examined in that the parties agreed to the facts. Thus the Board is not in possession of all the details of the financial constraints under which they operate. We do not know the size and the nature of the investments in their vehicles, their operating expenses,

their interest and participation in benefit programs, the rate of return on their financial and human investments, the total number of hours that they work in a week and the legal and practical difficulties in working for other employers. For example, for all the Board knows, when the expenses of the owner-operators are deducted from the revenue they receive, the owner-operators may be getting paid a rate comparable to the drivers. (See Livingston Transportation Limited [1972] OLRB Repts. 488 at ¶12.) Moreover, because the form of remuneration is an unreliable and highly manipulative factor, labour boards have tended to place little emphasis on this general factor or at least the factor has not been considered determinative. (See Sears Roebuck and Co. (Pittsburg, Pa.) 1969 CCH, NLRB 21,228; Minneapolis-Honeywell Regulator Co. (1965) 115 NLRB 334.)

In the absence of these details the Board lacks sufficient information about the extent of the alleged conflicting interests between the owner-operators and the drivers. These details are critical to the applicant's case if it is serious in requesting the Board to ignore the numerous similar interests outlined above. Moreover, we must observe that many of these differences, particularly the method of payment, are pre-collective bargaining phenomena. There would appear to be no intrinsic reason to infer that these differences would continue if collective bargaining is extended to the owner-operators.

20. Another general consideration that is relevant to this case is the policy against fragmenting bargaining units. A number of small units within an employer's work force is thought to result in a greater incidence of conflict because more than one collective agreement must be negotiated and a multiplicity of units and trade unions encourages competing jurisdictional claims. Further, as mentioned above, more comprehensive units provide employees with greater economic security. Large units can support more sophisticated benefit programs and provide an employee with access to a greater number of jobs before he is laid off. These factors most clearly militate against the applicant's claim.

21. The organizational structure of the employer cannot be ignored. If employees fall into distinct groups from the viewpoint of supervision and geography such groups often represent viable units for the purposes of collective bargaining. The facts before the Board in this regard do not support the applicant's request. The drivers and owner-operators are dispatched from the same location and both

are assigned to city and highway work. Thus the employer's organizational structure does not distinguish between the two groups of employees.

22. An applicant does not have to come forward with the most appropriate bargaining unit (The Board of Education for the City of Toronto [1970] OLRB Reps. 430). But it must satisfy the Board that the unit it seeks to represent is appropriate within the above discussed principles and policies and we cannot find that the applicant has met this onus in the facts at hand.

23. The applicant drew the Board's attention to the provisions of the British Columbia Labour Code S.B.C. 1973, c. 122, s. 1, s. 48 and the Canada Labour Code R.S.C. 1970, C.L.-1, s. 107. It is submitted that in both jurisdictions separate units would probably be given. Unfortunately no clear authority was cited to support this contention—in fact the British Columbia legislation contemplates one bargaining unit although section 48 requires the Board to satisfy itself that reasonable procedures have been developed to integrate dependent contractors into the bargaining unit. The Board has considered the Midland Superior Express Limited decision of the Canada Board [1974] 1 Canadian LRBR 267, but in that case a distinction was made between those drivers who were assigned to over-the-road hauling of goods on runs that involved long distance trips where two drivers in the tractor cab were away from home for days and those drivers assigned to short "express runs" of a day. This is a distinction the National Labour Relations Board has accepted but it is not based on whether the drivers own the vehicles or not. (See Georgian Highway Express Inc. 150 NLRB 1649; Alberquerque Phoenix Express 165, CCH, NLRB ¶9,479, 153 NLRB 430 (No. 47) eng'd (CA-10, 1966) 54 LC ¶11,557, 368 F (2d) 451.) The Byers Transport Limited decision [1964] 1 Canadian LRBR 343 is more in point but the distinction between owner-drivers and "other employees" is obiter and the particular facts supporting the distinction are not revealed. Accordingly neither case is of assistance.

24. The applicant claimed that the inclusion of owner-operators in the bargaining unit would result in an impossible task for negotiators. But if the Board is to act on such submissions the applicant should be prepared to outline the facts which support the conclusions. The applicant provided the Board with insufficient evidence.

Moreover, if regard is had to the experience before the National Labour Relations Board just the opposite is suggested. Many bargaining units containing drivers and owner-operators have been found appropriate in that jurisdiction and it has been the applicants that have requested the inclusion of the owner-operators before that Board. (See Florida Texas Freight Inc. (1972 CCH, NLRB ¶23,354), Pony Trucking Inc. (1972 CCH, NLRB ¶24,497) 198 NLRB No. 59, aff'd 486 (2d) 1039; Aetna Freight Lines Inc. 1972 CCH, NLRB ¶23,741, 94 NLRB 740; Tryon Trucking Inc. (1971 CCH, NLRB ¶23,337), 192 NLRB 764; The Maxwell Company (1967 CCH, NLRB ¶21,364), 174 NLRB 713, aff'd (60 LC ¶10,167), 414 F (2d) 447; Deaton Inc. (1971 CCH, NLRB ¶22,635), 187 NLRB 780; Ace Doran Hauling and Rigging Co. (1974-75 CCH, NLRB ¶15,172); Pioneer Holding Co. (1960 CCH, NLRB ¶8,641, 126 NLRB No. 133; Alterman Transport Lines (1969 CCH, NLRB ¶21,150) 1978 NLRB No. 21.) The wealth of this experience would appear to cut against the applicant's claim that negotiations for so-called "mixed units" are impossible. Finally, in two cases where the ownership of a vehicle was relied upon as an exclusive factor in requesting separate bargaining units the National Labour Relations Board rejected the proposition. (See Archie's Motor Freight Inc. (1961 CCH, NLRB ¶9,818, 130 NLRB 1627; Indiannapolis Times Publishing Co. (1949) 82 NLRB 1385.)

25. The Board does not want this case construed as a precedent for the proposition that so-called owner-operators will not be entitled to a separate bargaining. Each case must be judged on its own facts and circumstances may arise when the very factors that have, over the years given rise to difficulties in determining their employment status will justify a labour board in finding that a separate bargaining unit is appropriate. For example, a group of owner-operators may have the same kind of claim to a separate unit that justifies part-time employee bargaining units. However, where, as in this case, all the employees perform the same kind of work under the same conditions with identical supervision an applicant must be able to rely on more than the method of remuneration and claims that "problems" will be encountered in the collective bargaining.

26. For all of these reasons the Board finds that all employees of the respondent employed and working out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting

agreements with the International Woodworkers of America, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. The Board is satisfied on the basis of all the evidence before it that not less than thirty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 6, 1975, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

29. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

30. Should the owner-operators wish to make representations in regard to this result they may do so by way of a respondent for reconsideration. Accordingly the Board will not direct the posting of a new Form 5 with an amended bargaining unit description.

31. The matter is referred to the Registrar.

0207-75-R: Wood, Wire and Metal Lathers International Union, Local 562 (Applicant) v. C. STRAUSS (1973) LIMITED (Respondent) v. Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America, and Local 1747 United Brotherhood of Carpenters & Joiners of America (Intervenors).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members L. Hemsworth and H. Simon.

APPEARANCES AT THE HEARING: A. M. Minsky and H. K. Weller appearing for the applicant; Roy C. Filion and Harry Freedman appearing for the respondent; Harold F. Caley appearing for the interveners.

DECISION OF THE BOARD: July 21, 1975.

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3. At the hearing in this matter the parties executed the following written agreement concerning certain facts which are relevant to this application for certification. This written agreement states:

AGREEMENT OF THE PARTIES

The parties agree with each other as follows:

1. That the agreement dated November 9th, 1973, between the respondent and the October Provincial Council, United Brotherhood of Carpenters and Joiners of America was duly executed by both parties thereto and is attached hereto and marked Exhibit "A" to these proceedings. Attached hereto and marked Exhibit "B" to these proceedings is the agreement referred to in Exhibit "A" with schedules attached thereto.
2. That when the agreement marked Exhibit "A" was entered into on November 9, 1973, the respondent had not yet commenced its operations and had no employees; subsequently, commencing on November 12, 1973, the respondent employed persons who were members of the intervener, Local 1747.
3. Neither party to Exhibit "A" has furnished the other with notice of termination of, or proposed revision of, Exhibit "A"; no further or other agreements have been entered into by them.
4. The parties hereto specifically reserve their right to make any submissions whatsoever as to the conclusions the Board should draw from this agreement as to facts.

4. The interveners adopted the position that the alleged collective agreement which was dated November 9, 1973, conferred the status on the Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America (hereinafter referred to as the "Council") to intervene in this proceeding and that the alleged collective agreement is a bar to this application because it covers the employees who are affected by this application and that, having regard to the provisions of section 5(4) of The Labour Relations Act, this application is untimely.

5. The applicant and the respondent challenged the alleged collective agreement and maintained that it is not a collective agreement within the meaning of section 1(1)(e) of The Labour Relations Act. In addition, the applicant and the respondent argued that accordingly the alleged collective agreement is not a bar to this timely application for certification and that the Council was without status to intervene in this proceeding.

6. Local 1747 United Brotherhood of Carpenters & Joiners of America (hereinafter referred to as "Local 1747") filed evidence of membership on behalf of two of the employees who are affected by this application and intervened in this application for certification. No question arose as to the status of Local 1747 to intervene in this proceeding.

7. The Board heard detailed arguments which were based upon the agreement which is referred to in paragraph three herein.

8. The applicant argued that the alleged collective agreement is not a collective agreement and relied on two grounds. Firstly, on the ground that it is not a collective agreement on its own nor is cured by any other document. Secondly, the applicant argued that the alleged collective agreement is not a collective agreement because the Council did not represent employees of the employer on the date it was entered into.

9. The applicant contended that, with respect to the first ground, the alleged collective agreement did not purport to be a collective agreement, contained few, if any, terms and conditions of employment; envisaged a further signing by the respondent before the latter became bound; and, lacks a recognition clause. The applicant relied on section 35(1) of The Labour Relations Act. In brief, the applicant argued that the alleged collective agreement failed for incompleteness. In view of the decision of the Board on the second ground, it is not necessary for the Board to rule on the merits of this first ground.

10. The respondent agreed with the arguments of the applicant and, in addition, argued that section 110 of The Labour Relations Act had no application to the facts of this application.

11. The interveners argued that the alleged collective agreement is a collective agreement within the meaning of section 1(1)(e) of The Labour Relations Act. In addition, the interveners argued that sections 52 and 110 of The Labour Relations Act were the only sections that deal with the question of representation in the context of this application for certification. It was argued

that section 52 was only available where there is an attack on an alleged collective agreement within the first year of its existence and that section 110 creates an exception for the construction industry.

12. The Board observes that the second ground of the applicant's argument is not based upon section 52 but is rather based on section 40 of The Labour Relations Act. Section 110 of The Labour Relations Act states:

"An agreement in writing between an employer or employer's organization, on the one hand, and a trade union that has been certified as bargaining agent for a unit of employees of the employer, or a trade union or a council of trade unions that is entitled to require the employer or the employers' organization to bargain with it for the renewal, with or without modifications, of the agreement then in operation or for the making of a new agreement, on the other hand, shall be deemed to be a collective agreement notwithstanding that there were no employees in the bargaining unit or units affected at the time the agreement was entered into."

13. The Council has not been certified to represent the employees who are said to be covered by the alleged collective agreement. Section 110, in our view, is designated to preserve the legitimacy of the collective bargaining in the construction industry and to take into account the often intermittent nature of the employment relationship in the construction industry. This is not a situation where a collective agreement is to be renewed. It is a situation where the legitimacy of certain alleged bargaining rights is attacked on the grounds of the admitted circumstances which gave rise to the Council's claim to bargaining rights. For these reasons the Board finds that section 110 does not insulate the alleged collective agreement from attack.

14. The applicant and the respondent are not relying on the provisions of section 52 of The Labour Relations Act. Sections 52 and 40 approach the question of the operation of an alleged collective agreement from two different considerations. Section 52 may be considered as dealing essentially with the question of degree or quantum of representation while section 40 may be considered as dealing with the effect of certain prohibited conduct on an alleged collective agreement. A party to a proceeding may rely on either section 52 or section 40 according to how it perceives the facts.

15. The alleged collective agreement has been entered into at a time when the respondent had not commenced operations and had no employees. As the Board stated in the Sunrise Paving and Construction Co. Ltd. case, 72 CLLC ¶16,060:

"15. It is readily apparent that the alleged collective bargaining relationship between the respondent and the intervener arose as a result of an arrangement between them without reference to or consultation with the employees who would be affected by this arrangement. Clearly, the respondent selected the intervener as the bargaining agent for its future employees. Such an arrangement strikes at the very spirit of The Labour Relations Act which envisages the selection of a bargaining agent by the employees concerned without the intervention or influence of their employer.

16. Employees of the respondent did not have an opportunity to select their bargaining agent. The Board finds that the actions of the respondent in all of the circumstances of this application constitute other support to a trade union (the intervener) within the meaning of section 40(a) of The Labour Relations Act. The Board is given the jurisdiction to consider the question of support by an employer for a trade union. Certain consequences flow from the Board making a finding that an employer has contributed other support to a trade union. This consequence is set forth in section 40 of The Labour Relations Act."

16. The Board finds that the Council received other support from the respondent within the meaning of section 40(a) of The Labour Relations Act. Reference is made to the Kingsway Plastering Co. Ltd. case, OLRB M.R. February 1970, p. 1360, and to the Leonard G. Weber Construction case, OLRB M.R. November 1969, p.981. The Board therefore finds that the alleged collective agreement between the Council and the respondent dated November 9, 1973, is not a collective agreement for the purposes of The Labour Relations Act.

17. Having regard to the foregoing the Board finds that the Council has no status to intervene in this proceeding and that accordingly its purported intervention is dismissed.

. . .

22. A certificate will issue to the applicant.

0156-75-R: Canadian Workers Union (Applicant) v. FRANKEL STRUCTURAL STEEL LIMITED (Respondent) v. Shopmen's Local Union No. 743 of the International Association of Bridge, Structural and Ornamental Iron Workers (Intervener #1) v. Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #2) v. Group of Employees (Objectors).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members
F. W. Murray and P. J. O'Keefe.

DECISION OF THE BOARD: July 9, 1975.

1. The Board in its decision dated June 20, 1975, directed the Registrar "to list for hearing the matter of the applicant's allegations of wrongdoing." These wrongdoings allegedly committed by the respondent and the intervener were filed on May 12, 1975, the day scheduled for the initial hearing of the instant application for certification. At that time the Board determined the timeliness of the charges and adjourned the proceedings pending the holding of a representation vote where the respondent's employees were to choose between the applicant and the intervener as their bargaining agent. At that time counsel for the applicant had also requested an adjournment for the purpose of subpoenaing the attendance of witnesses in support of the charges. The Board directed that after the vote was held the ballot box be sealed and the matter of the charges thereafter be brought on for hearing at the earliest possible moment. During the intervening two month period the Board has been served with a notice of motion challenging its jurisdiction to proceed with the representation vote referred to and in response thereto the Board has subsequently been advised by The Divisional Court that it may proceed with the applicant's application in accordance with the principles cited in The Cedarvale Tree Services Ltd. case 71 CLLC ¶14,087 (CA). As a result, the Board was of the view that until advised to the contrary by The Divisional Court it ought to pursue the disposition of the application in accordance with the rulings of our initial decision. And in this regard the Board having regard to the protracted nature that these proceedings appear to have assumed directed the Registrar to list for immediate and continuous hearing all matters pertaining to the applicant's charges.

2. At the outset of the hearing in the afternoon of Monday, July 7, 1975, the Board asked the representative for the applicant to proceed with the evidence in support of its charges. The applicant responded by indicating that he had a number of preliminary motions to make. Thereafter, notwithstanding the Board's attempts to elicit some indication as to when the applicant intended to proceed with its charges, the balance of the afternoon was consumed by the Board in entertaining representations with respect to the applicant's preliminary motions. At approximately 5:30 p.m. the representative of the applicant indicated to the Board that he had presented his last preliminary motion.

3. At that time the representative of the applicant told the Board that the applicant had reached a crossroads that was not unanticipated by him in advance of the hearing. He expressed a reluctance to call evidence in connection with the charges in the event that the applicant be deemed at a later date to have acquiesced to the Board's jurisdiction in the face of its pending jurisdictional challenge. The Board to the limits of its capacity assured the applicant that the Board would take no position in subsequent proceedings that would prejudice its case before The Divisional Court because it chose to proceed on the merits of its charges. In response thereto and having regard to the hour of the day the applicant requested an adjournment for the purpose of seeking legal advice. In this regard the record of these proceedings show that the applicant has heretofore been represented by separate counsel at the initial hearing of this application and at subsequent proceedings before The Divisional Court. The applicant's motion for adjournment was strenuously opposed by counsel for the respondent and intervener having regard to the inconvenience that would result by a further delay in the proceedings.

4. At that time the Board expressed its concern that continued delay may be prejudicial to all parties including the employees affected by the application. Nevertheless we advised the parties that we would accede to a two hour adjournment in order to enable the representative of the applicant to consult with counsel. The representative of the applicant expressed dismay that the Board was proceeding so expeditiously and objected to the shortness of the adjournment. Indeed, the applicant pointed out that the Board was acting in a most unorthodox manner by proceeding into the evening hours. Since the representatives of the applicant, namely Mr. Perly and Mr. Lord, were not advised in advance of the Board's intention to conduct the proceedings into the

evening hours and since they had heretofore made previous commitments the applicant was of the view that it would be most unfair for the Board to proceed.

5. At 7:30 p.m. the Board resumed the proceedings. Counsel on behalf of the respondent and the intervener were in attendance. No representative appeared on behalf of the applicant. The Board adjourned the proceedings for fifteen minutes. At the expiry of fifteen minutes the Board reconvened and noted again that no one appeared on behalf of the applicant. At that time the Board indicated it would adjourn for another fifteen minutes in order to afford the applicant ample opportunity to make an appearance. Particular reference was made to The Domtar Packaging Limited v United Paperworkers International Union and Ontario Labour Relations Board case 74 CLLC ¶1402 (Div. Ct.) at p. 14,920. At approximately 8:00 p.m. the Board again convened and was presented with a letter from the representative of the applicant. In that letter the applicant repeated that the Board in proceeding with the hearing was acting in manner that was both unlawful and unfair. And it also repeated that because of prior commitments the representatives of the applicant could not attend at the appointed hour but indicated its intention to attend the Board hearing room at 9:30 a.m. the following morning.

6. After the Board had read the applicant's communication to counsel, the intervener and the respondent moved that the charges filed by the applicant be dismissed and that the Board's direction of May 15, 1975 ordering the ballot box be sealed pursuant to the representation vote arranged for Wednesday, July 9, 1975, be rescinded. Counsel for both parties argued that the applicant had ample opportunity to adduce evidence in support of its charges and had failed to take advantage of that opportunity. Furthermore it was alleged that the applicant's conduct in failing to attend the Board's premises for the purpose of indicating its intentions with respect to the disposition of its allegations was a discourtesy to the Board. At the close of counsels' argument the Board indicated that it was reserving its decision on their motions.

7. The Board has indicated during the course of these proceedings a desire to be both fair and equitable to all parties in making its rulings. We are quite aware of our responsibility to confer upon all parties an opportunity to represent and protect their interests and to enable them to call evidence and make argument for those purposes. In the

instant proceeding the Board has made and continues to make every effort to afford the applicant an opportunity to adduce evidence in support of charges made pursuant to its application for certification. The Board again notes that a half day has already been consumed by argument by way of preliminary motions on matters of jurisdiction that presently are before The Divisional Court. The Board also repeats that at the time of the adjournment the applicant indicated it had no further preliminary motions to make. Indeed, the proceedings broke off at a point where the applicant was to advise the Board whether or not it was electing to call evidence in support of the charges. And in this regard it has since had ample opportunity to consider its position and to seek counsel for that purpose. In other words, the Board continues to be disposed to afford the applicant every opportunity to adduce evidence for the purposes set out in the Board's endorsement of June 20, 1975.

8. As a result the Board by its endorsement of the record on July 8, 1975, directed the Registrar to list the matter of the applicant's charges for hearing. In the event that the applicant elects to call evidence for that purpose the parties are forewarned in advance that they should be prepared to proceed into the evening hours at the discretion of the Board.

9. The motions argued by the respondent and the intervener are therefore dismissed in that we hold that the applicant be given ample opportunity to adduce evidence in support of its allegations. And in so holding the Board is desirous of adhering not only to the letter but also the spirit of The Domtar Packaging Limited case (supra).

DECISION OF THE BOARD:

July 22, 1975.

1. Upon resumption of the proceedings on July 10, 1975, the applicant, having been conferred an opportunity to adduce evidence in support of its allegations of impropriety filed on May 12, 1975, withdraw from the proceedings.

2. The Board in the absence of any evidence in support thereof accedes to the motions of the intervener, Ironworkers and the respondent employer to dismiss the charges as alleged.

3. No statement of objection and desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 45 of the Board's Rules of Procedure following the taking of the representation vote

pursuant to the Board's direction of May 13, 1975, in this matter.

4. On the taking of the representation vote directed by the Board not more than fifty per cent of the ballots cast were cast in favour of the applicant.

5. The application is therefore dismissed.

6. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the bargaining unit within the period of six months from the date hereof.

7. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0360-75-R: Galt Typographical Union No. 411 (Applicant) v. KERR-PROGRESS PRINTING LIMITED (Respondent).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES AT THE HEARING: Robert Earles, Allan Histed and George Knight for the applicant; W.J. McNaughton, P. Saxe and W. Butcher for the respondent.

DECISION OF THE BOARD: July 29, 1975.

1. This is an application under section 55 of The Ontario Labour Relations Act, R.S.O. 1970, c. 232.

. . .

3. Until February 1974 the respondent operated a business engaged almost exclusively in the printing of tickets and the applicant represented all employees of the respondent engaged in composing room work. In February 1974 the respondent was known as John Kerr & Son Limited.

The Board was told that this business was located in the City of Galt, Ontario; however the Board notes that by the Regional Municipality of Waterloo Act, S.O.

1972, c. 105 the City of Galt and the Towns of Preston and Hespeler were amalgamated into a city municipality now bearing the name of the Corporation of the City of Cambridge. This Act came into effect on January 1, 1973. The amalgamated entity was first designated in the statute as the Corporation of the City of Galt but the name was later changed to the Corporation of the City of Cambridge.

4. If the terms of the jurisdiction or scope clause found in the current collective agreement between these parties are identical to those terms found in the previous collective agreements between the parties the collective agreement that existed between them in February 1974 (the date of the alleged sale) contained no explicit geographical boundaries. The relevant provisions in the current collective agreement read, in part:

"Members of the Union

1-01. The Employer agrees to employ only members of the Union to perform all work within the jurisdiction of the Union.

Jurisdiction

2-01. Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all composing room work and includes classifications such as..." [a number of classifications then cited]

5. The Board was informed that the respondent was interested in expanding its operations in order to engage in the printing of books. It was therefore confronted with the choice of expanding at its present location or locating somewhere else. Progress Printing Limited was a business located in the former town of Preston (and therefore in the Regional Municipality of Cambridge as of January 1, 1973) and it was engaged in the printing of books. The owner of that business owned the building in which the business was carried on.

In February 1974, John Kerr & Son Limited purchased all the equipment and inventories of Progress Printing Limited and "paid a little extra money for the use of the word 'Progress'"—a word it intended to incorporate into its own corporate name at a later time. It

had decided to incorporate the word 'Progress' into its name because John Kerr & Son Limited had always been associated with the printing of tickets and not books. It was therefore worth something to be able to use a word associated with a known commercial printer. John Kerr & Son Limited neither purchased the accounts receivable or assumed the liabilities or debts of Progress Printing Limited. It was also agreed that John Kerr & Son Limited would assume the lease of the building and the owner of the building agreed to build an extension on it. In other words, it was the respondent's intention to relocate at the Preston location.

However, until October 1, 1974 John Kerr & Son Limited operated out of the two locations. It continued to operate out of its Galt premises and at the Preston location it hired all the employees who had worked for Progress Printing Limited and operated that location under the business name "Progress Printing 1974". Then on October 1, 1974 it ceased to operate at the Galt location and moved all its equipment from that site to the Preston location. All of its employees who had worked at the Galt location continued to work at the Preston location—in fact there was a complete intermingling of employees at the Preston location in the composing room. In January 1975 the respondent changed its name to Kerr-Progress Printing Limited.

6. On June 14, 1975 the respondent renewed its collective agreement with the applicant containing the above-described recognition clause. The preamble identifying the parties and the terms of the agreement reads:

"THIS AGREEMENT, Made and entered into this 8th day of May, 1974 by and between the John Kerr & Son Ltd. Company (hereinafter sometimes referred to as the "Employer"), through its authorized representatives and Galt Typographical Union No. 411 (hereinafter sometimes referred to as the "Union"), by its officers or a committee duly authorized to act on its behalf, shall be effective beginning March 1, 1974, and ending January 31, 1976."

It would appear that the trade union knew of the intended relocation and it was claimed at the hearing that it

assumed the agreement it was negotiating was to apply to the new location.

7. Finally, it is important to note that a trade union did not represent the two employees of Progress Printing Limited employed in its composing room. Therefore since the integration of the two operations on October 1, 1974 three employees have worked in the composing room at the Preston location and only one of these employees is a member of the applicant.

8. The respondent admits that the transaction between John Kerr & Son Limited and Progress Printing Limited on February 1, 1974 constitutes the sale of the business. However, it submits that sections 55(6) and 55(8) of The Labour Relations Act are applicable because there has been intermingling of employees and the applicant represents only one of three employees in an appropriate bargaining unit. It submitted that in these circumstances, where a trade union represents approximately thirty-three per cent of the employees in an appropriate bargaining unit, the Board normally determines the representation rights of that trade union by way of a representation vote provided for under section 55(8). In this regard the Board's attention was drawn to Pinecrest Products Limited and Furnitex Corporation Limited [1972] OLRB Reps. Nov. 973; Avondale Dairy Limited [1971] OLRB Resp. Dec. 781; Bryant Press Limited [1972] OLRB Reps. April 301 and The Regional Municipality of Waterloo and The Corporation of the City of Cambridge [1973] OLRB Reps. June 302.

9. After all the evidence in this application had been adduced before the Board the applicant sought leave to withdraw its application. The respondent contests the applicant's right to withdraw an application in such circumstances and claims that it is entitled to a decision on the merits. The Board usually denies permission to withdraw an application in this way and would then go on to dismiss the application. However, the respondent requests a decision on the evidence placed before the Board and does not wish a dismissal. We are of the opinion that the application ought to be dismissed on the merits and therefore the applicant's request does not affect the real outcome of the application in any event.

10. The purpose of section 55 is to preserve bargaining rights and existing collective agreements that would otherwise terminate on the sale of a business. Were it not for section 55, on the sale of a business a successor employer might not be subject to the bargaining rights possessed by a trade union in relation to the predecessor business or to the collective agreement negotiated with that business by the trade union. Section 55 of the legislation reflects a policy judgment that successor employers ought to be subject to these important obligations notwithstanding the nature of an intervening commercial transaction.

11. However, when there is no trade union representing the employees of the predecessor employer or business there are no bargaining rights or collective agreements to preserve and thus the section has no application. This principle was applied in Mountain View Dairy Ltd. [1967] OLRB Reps. Feb. 911 where at para. 5 the Board wrote:

"It must also be noted that section 47a provides for the continuation of the bargaining rights of a trade union which represented employees of an employer whose business has been sold. It has no application in the case of the sale of a business whose employees have not been represented by a trade union. Thus, in the instant case, those former employees of Valley City now employed by Oakville Dairy at Waterdown, come within the bargaining unit and are represented by Teamsters."

All the cases relied upon by the respondent involved situations where the predecessor business was subject to a collective bargaining relationship with a trade union and the successor business was unorganized. In each case the employees of the two businesses were intermingled and the Board ordered a representation vote to protect the rights of the large number of employees affected by the applications who were not union members.

12. Finally, the specific wording used in sections 55(2), 55(3) and 55(4) makes it clear that these sections only apply when a predecessor employer or business had a collective bargaining relationship with a trade union and such is not the case in the facts at hand. Section 55(6) then goes on to relieve against the effects of sections 55(2), 55(3) and 55(4) when employees of the two businesses are

intermingled following a sale and the wording of section 55(6)(a) makes this relationship clear. A fortiori if sections 55(2), 55(3) and 55(4) have no application in the facts at hand section 55(6) is not applicable either. Thus even if we accepted the respondent's admission that the sale of a business occurred in February 1974 section 55 has no application in the circumstances.

13. The applicant brought this application in order to obtain a declaration that its relationship with the respondent survived the alleged sale that occurred in February 1974. For the reasons outlined above it is not entitled to such relief under section 55. Grievance arbitration is the form suited to providing the applicant with the relief it desires should an arbitrator find that the current collective agreement between the parties applies to the Preston location.

14. The application is dismissed.

0276-75-U: Retail Clerks International Association (Applicant)
v. LITTLE BROS. (WESTON) LIMITED (Respondent).

BEFORE: G.W. Adams, Vice-Chairman, and Board Members P. J. O'Keefe and J.E.C. Robinson, Q.C.

APPEARANCES AT THE HEARING: J.A. Ryder and Harold Jurchuk for the applicant; G.G. Smith and Ross Taylor for the respondent.

DECISION OF THE BOARD: July 30, 1975.

1. This is an application for consent to institute a prosecution of the respondent for an alleged offense under the Labour Relations Act R.S.O. 1970 c. 232.

. . .

3. The applicant alleges that the respondent has failed to bargain "in good faith and make every reasonable effort to make a collective agreement" in that (1) it will not bargain with the applicant in regard to wages or other monetary items for inclusion as a binding term in a collective agreement; and (2) it has steadfastly refused to bargain with the applicant with respect to any of the monetary items set out in a document entitled "Retail Salesmen's Rules and Compensation Plan".

4. The applicant was certified to bargain on behalf of the respondent's salesmen on November 12, 1974 (Board File No. 6690-74-R). It then gave the respondent notice to bargain by letter dated November 22, 1974. In a letter dated December 2, 1974 the respondent replied and indicated its willingness to meet at a "mutually agreeable time and place". The respondent requested that it be furnished with the applicant's proposals prior to such a meeting. On the 21st of January 1975 the applicant wrote to the respondent and enclosed "a rough copy of a proposed contract" and indicated that it was available at the respondent's convenience for negotiations.

5. Under the item Wages the rough draft reads:

"The Union proposes that the Company pay a base salary to all employees. There then shall be a system of commissions for all dollar volume sold."

6. By letter dated February 3, 1975 the respondent confirmed that February 10, 1975 had been set as the opening meeting date for negotiations. The evidence indicates that the parties met on this latter date, at the offices of the respondent, and reviewed the wording contained in the applicant's proposal. The proposal consisted of some twenty-three pages.

7. The parties met for a second time on February 25, 1975 and at this meeting three documents were exchanged. The respondent provided the applicant with a copy of its proposal for a collective agreement. This was a seven page document containing sixteen separate articles and Article 14 - entitled Rates of Pay - reads:

"14.01 All licensed motor vehicle salesmen shall be guaranteed a minimum draw of One Hundred Dollars (\$100.00) per week for a five (5) day work week. This shall be pro-rated for less than a five-day work week. Any difference between actual commissions earned and the minimum draw will not be charged back or recovered from any of the salesmen's future commissions.

"14.02 The Company shall continue in effect the existing compensation plans, bonuses and quote systems, which will necessarily have to be reviewed and amended by the Company from time to time due to market conditions, competition practices and other factors. Actual current compensation plans can be found in the Company policies and procedures which every salesman shall be furnished with, along with all revisions.

"14.03 Due to the competitive nature of the business, the Company retains exclusive discretion in the running of all sales contexts, incentive programs, supply and control of demonstrator vehicles, and all decisions regarding the distribution of commissions.

"14.04 The Company shall continue the practice of receiving and discussing representations from the salesmen regarding compensation plans, bonuses, sales contests or other remunerations conditions of work."

As well as this document, the respondent furnished the applicant with a document entitled "Dealer Policies and Procedures". The evidence establishes that, as well as setting out prescribed standards of behaviour, this document recorded the then current compensation plans in effect and thus the compensation plans referred to in Article 14.02. When this document was presented, the respondent told the applicant that it did not want this document to be part of or incorporated into the collective agreement, but it was a document the respondent wanted all employees to sign. The Board was told that the signatures were only intended to signify that the employees had received copies of the documents and were therefore familiar with the rules set out therein. Apparently it was not intended that the signatures connote their agreement with the content of the documents.

The third document exchanged at the February 25th meeting represented the applicant's initial monetary proposal. It reads in part:

- "WAGES - \$200. weekly guarantee.
- 4% of individual retail sales of used vehicles paid on monthly basis.

- 2% of total individual retail sales of new vehicles paid on a monthly basis.
- Salesmen to get commissions on house details.
- Commission on finance deals.
- Commission on all accessories items that are not covered in selling price of vehicle.
- An annual incentive bonus for employees on payroll at the end of the year. All employees on payroll will divide bonus on a prorated basis."

ANNUAL
BONUS

8. The evidence establishes that most of the February 28th meeting was devoted to reviewing the wording of the respondent's counterproposal and Harold Jurchuk, the negotiator for the applicant, testified that as a result of this exchange he got the impression that the respondent was not prepared to put anything into a collective agreement in regard to compensation other than the proposed Article 14. Moreover, a subsequent meeting, between Mr. Jurchuk and Mr. Smith, the respondent's negotiator, did not dispel this belief and the applicant applied for the appointment of a conciliation officer on March 27, 1975 and no further meetings occurred between the parties until April 18, 1975—a meeting convened by a conciliation officer. The parties were separated for a time and when face to face negotiations were resumed, Mr. Jurchuk took exception to a number of the respondent's proposals, he respondent replied to most of these exceptions and, apparently as a result of this exchange, the applicant's representatives left the meeting place. The Board was informed that Mr. Evans, a representative of the applicant, contacted Mr. Little, Sr. for the respondent but no direct evidence of the content of this communication was presented to the Board. Thus all the Board can observe is that it amounted to the final contact between the parties before the employees of the respondent commenced a lawful strike.

9. Accordingly, the parties met three times formally and once or twice informally before the commencement of strike activity.

10. The applicant takes the position that the respondent's stance on wages is tantamount to a refusal to bargain on wages or, expressed in an alternative fashion, the respondent's request that it be permitted to unilaterally amend the compensation plans during the term of the collective agreement is a refusal to enter into a collective agreement for the minimum term of one year as required by the legislation. It is alleged that the proposal, in regard to a fundamental issue in collective negotiations, is so illusory as to amount to no proposal at all. The applicant further submitted that Article 14.04 is really a demand that the respondent be permitted to deal with the employees directly—a demand which is alleged to be contrary to both section 35 of the Labour Relations Act and the legal significance of certification under the legislation.

11. On the other hand the respondent caused its general sales manager, Mr. Ross Taylor, to give evidence. He told the Board that the respondent had never taken the position that it wanted the right to implement changes in compensation without consulting the union. Further the Board was informed that the respondent's proposals were not to be construed as requesting authority to revise the compensation plans to the employees' detriment. Mr. Taylor explained that the respondent's operation was the first in the retail automobile industry to be organized by a trade union and it wanted a contract that would allow it to remain competitive in the industry. A number of the compensation or sales incentive plans were explained to the Board as was the volatile nature of the retail automobile market in order to buttress and justify the respondent's desire for a flexible approach to employee compensation.

12. Mr. Taylor testified that the respondent thought it was very difficult to lay down rigid compensation rules over a two year period in the future and thus its strategy was to obtain as much flexibility in this area as possible. However, he was careful to add that the respondent had not taken "a take-it-or-leave-it" stance. In fact, on cross-examination, the hearing came very close to a negotiation session wherein Mr. Taylor indicated that there was really no problem in setting out the "Dealer Policies" in the collective agreement provided the respondent had a right to amend "upward". He emphasized that the respondent had never "closed the door" and had really never heard back from the applicant.

13. A thorough review of the evidence indicates that the application must be dismissed.

14. Given the nature of the industry and the fact that there is very little Canadian collective bargaining experience in it, the employer's position to date cannot be said to be in violation of the legislation. The proposals contained in Article 14 are not unlawful per se and so little bargaining has taken place it is not possible to conclude that the respondent has taken so rigid a position as to evidence a desire to avoid a collective agreement. The evidence does not establish that by Article 14.04 it wishes to unilaterally negotiate with its employees to the exclusion of the trade union.

15. At a more technical level, we acknowledge that section 45(1) provides that collective agreements must be for a minimum term of one year but the respondent's proposal in no way evades this provision. The ability to amend an agreement in this way would not and could not affect the minimum term of the agreement—a term that, having regard to section 44(5), must be aimed at delaying timely economic conflict and not changes in the terms of collective agreements. More importantly, the respondent indicated that by Article 14.02 it wished to reserve the power to revise its compensation plans upwards not downwards. With this construction, given the limited time span of the actual negotiations and the nature of this industry, the proposal cannot be considered so illusory as to amount to no proposal at all or a refusal to bargain.

16. The applicant drew the Board's attention to McGavin Toastmaster Ltd. v. Ainscough et al 75 CLLC 14,277 (S.C.C.), a recent decision of the Supreme Court of Canada. However, we do not believe that the principle articulated in that case has any application in the facts at hand. In that case the Chief Justice relied upon the following statement of Judson J. in Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee [1957] S.C.R. 206 at p. 212 in holding that questions such as repudiation and fundamental breach are inapplicable to a collective agreement in the face of modern industrial relations legislation.

"...There is no room left for private negotiations between employer and employee. Certainly to the extent of the matters covered by the collective

agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employee on what terms he must in the future conduct his master and servant relations..."

17. In these peculiar circumstances, there was no evidence that the respondent was seeking to evade the principle outlined in these cases.

18. Subsequent to the hearing the applicant filed material raising allegations of offence under the legislation. These offences were alleged to have occurred following the hearing in this matter. We are of the opinion that these matters must be raised by way of a separate application and cannot be considered by the Board in rendering this decision.

19. For all these reasons this application is dismissed.

7443-74-R: St. Catharines Typographical Union, Local 416, International Typographical Union (Applicant) v. THE ST. CATHARINES STANDARD LIMITED (Respondent).

INADVERTENTLY OMITTED FROM THE JUNE MONTHLY REPORTS.

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members F. W. Murray and P. J. O'Keeffe.

APPEARANCES AT THE HEARING: R. Earles, A. Histed, Mary Duhaime and W. Stanley for the applicant; D. W. Brady, H. Burgoyne and G. McFarlane for the respondent.

DECISION OF THE BOARD: June 13, 1975.

. . .

3. On March 24, 1975, a Labour Relations Officer was appointed to inquire into the duties and responsibilities of several named classifications. During the course of the officer's inquiry, the parties reached agreement on the bargaining unit description, subject only to the determination by the Board of the status of Mary Ann Voth, whose occupational classification is "Cashier".

4. Much of the evidence concerning Ms. Voth's status is unsatisfactory. For example, the unit is comprised of

"all employees...in the Classified Advertising Department...", subject to certain specified exceptions. It is critical, therefore, to determine the department in which the witness works. She described it, initially, as the "Accounting Department Classified", a description which does not appear on the organizational chart filed by the respondent. Her later concession, in response to a leading question by the applicant, that she is in the "Classified Advertising Department" does not completely cure the doubt. Nor is any real assistance obtained from the organizational chart. The chart is a study in confusion: hand-sketched, it is a maze of titles and lines, (some leading nowhere), the total effect of which is to confound, rather than to enlighten. Another critical area of inquiry is the amount of time spent by the witness in matters related to classified advertising. However, she was unable to offer any estimate on this important question, and no other evidence was tendered by either party which would permit us to draw any conclusion as to the breakdown of her work assignments.

5. We make these initial observations, not to embarrass the parties, but to emphasize the Board's difficulties. If an informed and helpful decision is expected from the Board in matters of this sort, the parties have an obligation to present clear and comprehensible evidence on all material facts. They have failed to do so in this case.

6. However, on the material before us, we are able to make the following findings. Ms. Voth, as her title indicates, is responsible for cash receipts, some of which are in payment for classified advertisements. She also acts as a receptionist, her work location being adjacent to the public entrance. There are seven classified ad-takers in the Classified Advertising Department (comprising a majority of the ten-person bargaining unit found to be appropriate herein) and every fourth Saturday Ms. Voth does the work of a classified ad-taker. She is relieved during break periods by persons from the Classified Advertising Department. Her vacation schedule is determined in relation to, and integrated with, the vacations of others in the Classified Advertising Department. She has intermittent daily contacts with persons from other Departments: e.g., Circulation and Accounting.

7. The witness testified that Mrs. Finn, identified as the Classified Office Manager, is her supervisor. She stated that she was responsible to Mrs. Finn for the majority

of her work; that Mrs. Finn interviewed her for employment; that Mrs. Finn normally pays her; and that when she is off sick, she reports her absence to Mrs. Finn. In reference to supervision, she conceded that Mrs. Finn has never instructed her on cashier work. Apparently tabulation mistakes made by the witness would be detected by persons in the Accounting Department. In fact, Ms. Voth appears to be subject to little supervision from any source - not, perhaps, an unusual fact in the case of an experienced cashier.

8. The witness is not the respondent's only cashier. She testified that there are two cashiers in the Accounting Department on the third floor. Ms. Voth, on the other hand, is on the first floor, in close proximity to the classified ad-takers.

9. Having considered all of the evidence and the representations of the parties, including the able submissions of counsel for the respondent, we are of the view that Ms. Voth is employed in the respondent's Classified Advertising Department and, therefore, is properly included within the bargaining unit. She has a greater community of interest, in terms of her reporting relationship, physical location, and duties and functions, with persons within the Classified Advertising Department than with any other group.

10. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at St. Catharines employed in the Classified Advertising Department, save and except Classified Office Manager, Assistant Classified Office Manager, Director of Advertising, Classified Sales Manager, Classified and Display Advertising Salesman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

11. For the purpose of clarity, the Board notes the further agreement of the parties that Lily Felice and Ruth Wallace, or their permanent replacements or additions to staff employed in the same function, who work within the Classified Advertising Department but do not share a community of interest with other persons within the department, are excluded from the above-described bargaining unit.

12. In accepting the agreement of the parties, we wish to state that although the Board does not normally

grant departmental units, such units have been recognized as appropriate in the newspaper publishing industry: see, for example, Telegram Publishing Company Limited, 59 CLLC ¶18,126; Globe and Mail Limited, 63 CLLC ¶16,290, where Circulation Department units were held to be appropriate. Moreover, it is presumed that the parties themselves know how their collective bargaining relationship can best be structured. Therefore, unless the agreed unit is patently irrational or unworkable - for example, if the grouping has no functional or organizational coherence, or if it excludes persons without convincing justification - the Board will normally accede to the wishes of the parties.

. . .

14. A certificate will issue to the applicant.

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TABLE V

REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD

<u>Number of Votes</u>	
<u>1st. Quarter</u>	
<u>April 1, to June 30.</u>	
1975-76	1974-75

Certification After Votes*

Pre-Hearing Vote
 Post-Hearing Vote
 Ballots Not Counted

Dismissed After Vote

Pre-Hearing Vote
 Post-Hearing Vote
 Ballots Not Counted

TOTAL

*Includes applicant-intervener application in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE VI

REPRESENTATION VOTES IN TERMINATION APPLICATIONS DISPOSED OF BY
THE ONTARIO LABOUR RELATIONS

<u>Number of Votes</u>	
<u>1st. Quarter</u>	
<u>April 1, to June 30.</u>	
1975-76	1974-75

*Respondent Union Successful
 Respondent Union Unsuccessful

TOTAL

*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent union is thus the respondent.

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARDDURING JULY 1975BARGAINING AGENTS CERTIFIED DURING JULYNo Vote Conducted

7403-74-R: Ontario Nurses' Association (Applicant) v. The Freeport Hospital (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at The Freeport Hospital, Kitchener, save and except supervisors and persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (26 employees in the unit).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than twenty-four hours per week at The Freeport Hospital, Kitchener, save and except supervisors and persons above the rank of supervisor." (16 employees in the unit).

7411-74-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.L.C. (Applicant) v. General Mills Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent working in its Lancia-Bravo Division in Metropolitan Toronto, save and except foremen, foreladies and those above the rank of foreman and forelady, office, sales staff, employees regularly working not more than twenty-four hours a week, students employed during the school vacation period and employees covered by existing collective agreements." (252 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS OF THE PARTIES). (FOR THE PURPOSES OF CLARITY THE BOARD NOTED THAT THE DESCRIPTION IS INTENDED TO APPLY TO THE EMPLOYEES WORKING AT 58A HOOK AVENUE AND IS NOT INTENDED TO INCLUDE A "KEELE CENTRE" WAREHOUSE OR A "C.P." WAREHOUSE, USED FOR SHIPPING.).

Unit #2: "all employees of the respondent regularly working for less than twenty-four hours a week and students employed during the school vacation period in its Lancia-Bravo Division in Metropolitan Toronto, save and except foremen, foreladies, those above the rank of foreman and forelady, office, sales staff, employees regularly working more than twenty-four hours a week and employees covered by existing collective agreements." (26 employees in the unit).

7553-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Lyn-Tone Drywall Co. Limited (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers, Masons & Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (HAVING REGARD TO THE FOREGOING).

7554-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Speed Drywall Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers, Masons & Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0207-75-R: Wood, Wire and Metal Lathers International Union, Local 562 (Applicant) v. C. Strauss (1973) Limited (Respondent) v. Ontario Provincial Council, United Brotherhood of Carpenters & Joiners of America, and Local 1747 United Brotherhood of Carpenters & Joiners of America (Interveners).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

(1975) 2 OLRB M.R. - PAGE 581.

0288-75-R: Ontario Nurses' Association (Applicant) v. The Cottage Hospital, Uxbridge (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity at The Cottage Hospital in Uxbridge, save and except head nurses, persons above the rank of head nurse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

(BARGAINING UNIT #2 - SEE APPLICATION CERTIFIED SUBSEQUENT TO POST-HEARING VOTE).

0349-75-R: Labourers International Union of North America Local Union #493 (Applicant) v. Roberts' Mechanical Piping of Sudbury Ltd. (Respondent) v. Local Union 800 of The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Intervener).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0350-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation #75 (Respondent).

Unit: "all employees of the respondent in Toronto, save and except property managers, persons above the rank of property manager, office and clerical staff." (4 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

(1975) 2 OLRB M.R. - PAGE 534.

0353-75-R: Office & Professional Employees International Union (Applicant) v. The Ontario-Minnesota Pulp and Paper Company Limited (Respondent).

Unit: "all office, clerical and technical employees of the respondent employed in its office in the City of Kenora, save and except supervisors, persons above the rank of supervisor, plant nurse, chief chemist, security guards, a secretary to the resident manager, a secretary to the personnel and industrial relations manager, a secretary to the controller, payroll supervisor, cost supervisor, assistant stores supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements." (23 employees in the unit). (FOR PURPOSES OF CLARITY THE BOARD NOTED THAT THE PARTIES HAVE AGREED THAT ANY PERSON EMPLOYED AS GUIDE OR STAFF HOUSE COOK SHALL BE EXCLUDED FROM THE BARGAINING UNIT, THE CLASSIFICATION

OF FINISHING AND SHIPPING ASSISTANT SUPERINTENDENT IS ABOVE THE RANK OF SUPERVISOR AND THAT CLEANING CUSTODIANS ARE NOT APPROPRIATE FOR INCLUSION IN THE BARGAINING UNIT.).

0379-75-R: The Civil Service Association of Ontario Inc. (Applicant) v. Royal City Ambulance Service Division of Vermay Enterprises Limited (Respondent).

Unit: "all employees of the respondent at Guelph employed as Ambulance Attendants Drivers and Dispatchers, save and except supervisors and persons above the rank of supervisor." (11 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0383-75-R: International Brotherhood of Painters and Allied Trades Local 1834 - Glaziers (Applicant) v. C - Rite Windows Limited (Respondent).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office staff, persons employed for not more than 24 hours per week, and students employed during the school vacation period." (9 employees in the unit).

0402-75-R: Federation of Children's Aid Staffs (Applicant) v. Young Women's Christian Association of Metropolitan Toronto (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors, those above the rank of supervisor, directors, administrative co-ordinators, housing unit co-ordinators, sessional and contract workers." (69 employees in the unit).

0409-75-R: Canadian Union of Public Employees (Applicant) v. Community Memorial Hospital (Port Berry) (Respondent).

Unit #1: "all employees of the respondent at Port Berry, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, student dieticians, persons employed by Beaver Foods Ltd. in the hospital, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (21 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS OF THE PARTIES).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, persons employed by Beaver Foods Ltd. in the hospital, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, also." (11 employees in the unit). (HAVING REGARD TO THE BOARD'S PRACTICES AND THE AGREEMENT OF THE PARTIES). (FOR THE PURPOSES OF CLARITY "TECHNICAL PERSONNEL", AS USED TO DESCRIBE BOTH UNITS, INCLUDES PHYSIOTHERAPISTS, LABORATORY ECG AND RADIOLOGICAL TECHNICIANS AND TECHNOLOGISTS.).

0410-75-R: Canadian Union of Public Employees (Applicant) v. Victoria County Board of Education (Respondent).

Unit: "all office, clerical and technical employees of the respondent employed in the County of Victoria, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, secretary to the Superintendent of Business and Finance, secretary to the Superintendent of Schools, supervisor of custodians and purchasing agent, the accountant, the transportation and attendance officer, psychologists, speech therapists, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, persons covered by a subsisting agreement between the respondent and CUPE Local #855 and teachers as defined by the Teachers' Profession Act." (45 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES). (FOR THE PURPOSE OF CLARITY IT IS NOTED THAT THE PARTIES FURTHER AGREE THAT HEAD SECRETARIES IN THE FOLLOWING SCHOOLS: LINDSAY COLLEGIATE AND VOCATIONAL INSTITUTE I.E. WELDON SECONDARY SCHOOL, FENELON FALLS SECONDARY SCHOOL ARE EXCLUDED FROM THE BARGAINING UNIT UNDER SECTION 1(3)(B) OF THE LABOUR RELATIONS ACT.).

0423-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Daly Construction Co. Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0435-75-R: Canadian Union of Public Employees (Applicant) v. London and Middlesex County Roman Catholic Separate School Board (Respondent).

Unit: "all employees of the respondent at London regularly employed for not more than 24 hours per week in custodial and maintenance services and students employed during the school vacation period, save and except foremen, persons above the rank of foreman and office staff." (14 employees in the unit).

0450-75-R: Canadian Union of Public Employees (Applicant) v. Empire Maintenance Ltd. (Respondent).

Unit: "all employees of the respondent engaged in cleaning services at the Providence Villa and Hospital, Scarborough, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period." (24 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0458-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Harold Marcus Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent in and out of Zone Township in the County of Kent, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, office staff regularly employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0459-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the City of Toronto (Respondent).

Unit #1: "all psychologists, psycho-educational consultants, social workers and associate social workers in the employ of the respondent at the City of Toronto save and except supervisors and persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than twenty-four hours per week." (77 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES). (FOR THE PURPOSE OF CLARITY, THE BOARD NOTED THE AGREEMENT OF THE PARTIES THAT THE TERM "ASSOCIATE SOCIAL WORKERS" INCLUDES INTERPRETER COUNSELLORS, ATTENDANCE COUNSELLORS AND COMMUNITY LIAISON WORKERS.).

Unit #2: "all psychologists, psycho-educational consultants, social workers and associate social workers in the regular employ of the respondent for not more than twenty-four hours

per week at the City of Toronto save and except supervisors, persons above the rank of supervisor, office and clerical staff." (22 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0462-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Ron St. Denis (Respondent).

Unit: "all persons engaged in the installations of carpets in the employ of the respondent in the Regional Municipality of Ottawa - Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0471-75-R: The Association of General Studies Teachers in Hebrew Day Schools (Applicant) v. United Synagogue Day School (Respondent).

Unit: "all employees employed as teachers and in related educational activities by the respondent in the municipality of Metropolitan Toronto save and except the Principal and persons above the rank of Principal and Hebrew teachers." (38 employees in the unit).

0472-75-R: International Brotherhood of Pottery and Allied Workers (Applicant) v. Canadiana Pottery Limited (Respondent).

Unit: "all employees of the respondent at Ingleside, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (30 employees in the unit).

0475-75-R: The Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of North York (Respondent).

Unit #1: "all psychologists, assistants to psychologists and assistant counsellors employed by the respondent in the Borough of North York, save and except supervisors, persons above the rank of supervisor and persons who are regularly employed for not more than twenty-four hours per week." (41 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS BEFORE IT AND TO THE AGREEMENT OF THE PARTIES). (FOR THE PURPOSES OF CLARITY, THE BOARD DECLARED THAT SENIOR PSYCHOLOGISTS ARE THE LINE SUPERVISORS AND ARE EXCLUDED FROM THE BARGAINING UNIT AND

THAT PERSONS CLASSIFIED AS TEACHER-COUNSELLORS ARE EXCLUDED FROM THE BARGAINING UNIT. THIS CLARITY NOTE APPLIES TO THE BARGAINING UNITS WHICH ARE DETERMINED IN PARAGRAPHS TWO AND FIVE HEREIN.).

Unit #2: "all psychologists, assistants to psychologists and assistant counsellors who are regularly employed by the respondent in the Borough of North York for not more than twenty-four hours per week, save and except supervisors and persons above the rank of supervisor." (6 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS BEFORE IT AND TO THE AGREEMENT OF THE PARTIES).

0479-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Law Construction Ltd. (Respondent).

Unit: "all employees of the respondent, working in the Townships of Springer, Caldwell, Badgerow, Field, Grant and Pedley, excepting therefrom those portions of the Townships of Grant and Pedley which are included in the area encompassed by a twenty mile radius of the North Bay post office, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and those above the rank of non-working foreman." (2 employees in the unit).

0480-75-R: Canadian Union of Operating Engineers (Applicant) v. Eastwood Food Services Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in its Cafeteria at 7 Overlea Boulevard in Metropolitan Toronto, save and except manageress, persons above the rank of manageress, persons employed for not more than 24 hours per week, and students employed during the school vacation periods." (10 employees in the unit).

0483-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Weldland Steel Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0491-75-R: Local Union 1687 International Brotherhood of Electrical Workers (Applicant) v. M. G. Burke Investments Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and

persons above the rank of non-working foreman." (5 employees in the unit). (FOR THE PURPOSE OF CLARITY, THE BOARD DECLARED THAT PERSONS EMPLOYED IN MOTOR WINDING AND OIL-BURNER SERVICES ARE NOT INCLUDED IN THE BARGAINING UNIT.).

0494-75-R: Ontario Nurses' Association (Applicant) v. The Canadian Red Cross Blood Transfusion Service (Toronto Centre) (Respondent).

Unit: "all registered and graduate nurses engaged in a nursing capacity employed by the respondent working at and out of Metropolitan Toronto, save and except assistant supervisor, persons above the rank of assistant supervisor and persons employed on a casual or temporary basis." (13 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0496-75-R: London and District Service Workers Union, Local 220, SEIU-AFL, CLC (Applicant) v. Telephone Answering Service of Sarnia Limited (Respondent).

Unit #1: "all employee bargaining unit and the respondent objected to the inclusion of part-time employees and students employed during the school vacation period. Having regard to the Board's practice we find all employees of the respondent at Sarnia, Ontario, save and except supervisors, persons above the rank of supervisor, salesmen, secretary to the president and general manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in the unit). (GRANTED).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at Sarnia, Ontario." (4 employees in the unit). (DISMISSED).

0497-75-R: Service Employees Union Local 268 (Applicant) v. Beacon Hill Lodges of Canada Ltd. Thunder Bay, Ontario (Respondent).

Unit: "all employees of Beacon Hill Lodges of Canada Ltd., Thunder Bay, Ontario regularly employed for not more than twenty-four hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and students employed during the school vacation period of May to September." (27 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0504-75-R: International Chemical Workers Union, Local 536 (Applicant) v. Du Pont of Canada Limited, Maitland Works (Respondent).

Unit: "all employees of the respondent at Maitland, Ontario, save and except foremen and persons above the rank of foreman, engineering, technical and medical staff, office employees, guards and employees covered by the subsisting collective agreement between the applicant and the respondent." (20 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0505-75-R: Laborers' International Union of North America Local Union No. 597 (Applicant) v. Tricont Projects Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0506-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Scorpio Engineering (St. Catharines), Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0512-75-R: Christian Labour Association of Canada (Applicant) v. York Cartage Service Limited (Respondent).

Unit: "all employees of the respondent employed in and out of Mississauga, save and except foremen, persons above the rank of foreman, dispatchers, and office and sales staff." (47 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS OF THE PARTIES).

0514-75-R: Amalgamated Meat Cutters and Butcher Workmen of North America (Applicant) v. Culverhouse Foods Ltd. (Respondent).

Unit: "all regular full time employees of the respondent at its Vineland Station Plant, save and except plant managers, fieldmen, foremen and floor ladies and persons above the rank of foreman and/or floor lady, office and sales staff, stationary engineers, seasonal employees and employees regularly employed for not more than twenty-four hours per week." (7 employees in the unit). (HAVING REGARD TO THE REPRESENTATIONS OF THE PARTIES).

0517-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Doorways Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa - Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0519-75-R: United Steelworkers of America (Applicant) v. Burlington Works-Fastener Shipping Centre, The Steel Company of Canada, Limited (Respondent).

Unit: "all employees of the respondent employed in its Fastener Shipping Centre, Burlington Works, located at Burlington, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales personnel and security guards." (9 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0521-75-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Prince and Zold Limited (Respondent).

Unit: "all sheetmetal workers and sheetmetal apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0522-75-R: Labourers International Union of North America, Local #493 (Applicant) v. Franki Canada Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0524-75-R: Christian Labour Association of Canada (Applicant) v. D. L. Stephens Contracting Niagara Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices, construction labourers and all employees of the respondent in the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0531-75-R: Labourers' International Union of North America Local 491 (Applicant) v. Gaudreault Plastering (Respondent).

Unit: "all construction labourers in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0553-75-R: Office and Professional Employees International Union (Applicant) v. Hamilton Municipal Employees' Credit Union Limited (Respondent).

Unit: "all office employees of the respondent in Hamilton, save and except senior accounting clerk and persons above the rank of senior accounting clerk." (7 employees in the unit).

0558-75-R: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Agua Temp Mechanical Contractors Limited (Respondent).

Unit: "all plumbers, plumbers' apprentices, sheet metal workers and sheet metal apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0559-75-R: The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tip Top (Division of Dylex Limited) (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0560-75-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Jensen Fitting Manufacturing Ltd. (Respondent).

Unit: "all employees of the respondent in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (7 employees in the unit).

0563-75-R: Canadian Union of Public Employees (Applicant) v. The Lanark County Board of Education (Respondent).

Unit: "all officer, clerical and technical employees of the respondent, save and except managers, persons above the rank of manager, secretary to the Director of Education, one secretary to the school superintendents, secretary to the Business Administrator, senior secretary to the manager of payroll, psychometrists, attendance counsellor, teachers as defined in the Teaching Profession Act, and persons covered by a subsisting collective agreement between the respondent and The Lanark County Board of Education Custodians Maintenance Employees Association." (42 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0568-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Flavorite Poultry Limited (Respondent).

Unit: "all employees of the respondent at Hamilton regularly employed for not more than twenty-four hours a week and students employed during the school vacation periods, save and except office and sales staff." (9 employees in the unit).

0575-75-R: Labourers' International Union of North America, Local 837, Hamilton, Ontario (Applicant) v. A. V. Tennant, General Contractors Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0576-75-R: Christian Labour Association of Canada (Applicant) v. Heathrow Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0577-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ferrantone Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0578-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Richard Jones Ltd. (Respondent).

Unit: "all employees of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0579-75-R: Grand River Valley District Council of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Transway Steel Buildings Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0582-75-R: Local Union 636, International Brotherhood of Electrical Workers, AFL, CIO-CLC (Applicant) v. Milton Hydro-Electric Commission (Respondent).

Unit: "all office and clerical employees of the respondent, save and except the manager and secretary-treasurer, persons above the rank of manager and secretary-treasurer, the secretary to the manager and secretary-treasurer, persons who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit).
(HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0584-75-R: Christian Labour Association of Canada (Applicant) v. Pro Electric Incorporated (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen

and persons above the rank of non-working foreman." (4 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0592-75-R: United Steel Workers of America (Applicant) v. B.A.C.M. Mine Developers Ltd. (Respondent).

Unit: "all employees of the respondent at its Umex mine, Pickle Lake, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff." (11 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

0607-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mordini Carpentry Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0619-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Carpentry Limited (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0620-75-R: International Association of Bridge Structural and Ornamental Iron Workers Local 721 (Applicant) v. Ellis Don Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent Metropolitan Toronto, The Regional Municipality

of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0623-75-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. W. Benson Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit). (HAVING REGARD TO THE FOREGOING).

0631-75-R: Labourers International Union of North America, Local Union #493 (Applicant) v. Shamrock Drillers Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Townships of Springer, Caldwell, Badgerow, Field, Grant and Pedley, excepting therefrom those portions of the Townships of Grant and Pedley which are included in the area encompassed by a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0637-75-R: Christian Labour Association of Canada (Applicant) v. D.L. Stephens Contracting Niagara Limited (Respondent).

Unit: "all construction labourers and all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (HAVING REGARD TO THE FOREGOING).

Applications Certified Subsequent to Pre-Hearing Vote

7513-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Durable Drywall Limited (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener #1	1

7514-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Empire Lathing & Drywall Co. Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener #1	0

7516-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Canwall Contractors Limited (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all Plasterers and Plasterers' Apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit). (HAVING REGARD TO THE FOREGOING).

Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener #1	0

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7531-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Marel Contractors (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees in the unit).

Number of persons who cast ballots	29
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	25
Number of ballots marked in favour of Intervener #1	3

7532-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Sirox Plastering Co. Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of Intervener #1	0

7533-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. D. V. Contracting Company (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener #1	4

7534-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. D. V. Contracting Company (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #2).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of Names of persons on revised voters list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4

7542-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Lido Plastering (York) Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the

County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Townships of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener #1	0

7556-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. A.L.C. Interior System Inc. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener #1	0

0012-75-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Downsview Lathing & Drywall Co. Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener #1	0

0164-75-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Kingsway Plastering Co. Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Number of names of persons on revised voters list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4

0178-75-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Donaldson & Barron Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener #1	0

0324-75-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employes Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs and Warehousemen & Helpers of America (Applicant) v. Weston Bakeries Limited (Respondent) v. National Council of Canadian Labour Local 201 (Intervener #1).

Unit: "all employees of the respondent at Essex and Chatham, save and except foremen, foreladies, persons above the rank of foreman or forelady, transport drivers, salesmen and office staff." (66 employees in the unit). (HAVING REGARD TO THE EVIDENCE AND REPRESENTATIONS OF THE PARTIES).

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	54
Number of ballots marked in favour of applicant	49
Number of ballots marked in favour of intervener	5

0334-75-R: International Woodworkers of America (Applicant) v. Floorco Limited (Respondent).

Unit: "all employees of Floorco Limited in the respondent's manufacturing operation at 21 Research Road, save and except foremen, persons above the rank of foreman, office and sales staff, employees engaged in laying, installing and finishing floors, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (46 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

Number of names of persons on voters list	46
Number of persons who cast ballots	44
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	1

0391-75-R: Canadian Food and Allied Workers Local Union 633, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Belmont Meat Products Limited (Respondent).

Unit: "all employees of Belmont Meat Products Limited engaged in its meat processing operation at Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor,

office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (71 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

Number of names of persons on revised voters' list	67
Number of persons who cast ballots	62
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant BALLOT BOX	19

0416-75-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. De Vilbiss (Canada) Limited (Respondent).

Unit: "all employees of the respondent at Barrie, save and except foremen, those above the rank of foreman, office and sales staff, students employed for the school vacation period and persons regularly employed for not more than twenty-four hours per week." (101 employees in the unit). (HAVING REGARD TO THE AGREEMENT OF THE PARTIES).

Number of names of persons on list as originally prepared by employer.	102
Number of persons who cast ballots	99
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	45

0419-75-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Genoble Distribution Limited (Respondent).

Unit: "all employees of the respondent at Hamilton, save and except foremen and dispatchers, and those above the rank of foreman and dispatcher, office staff, sales staff and persons regularly employed for not more than 24 hours per week." (20 employees in the unit).

Number of names of persons on voters' list	18
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	3

Applications Certified Subsequent to Post-Hearing Vote

5873-74-R: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. Ontario Hydro (Respondent) v. Ontario Hydro Employees' Union Local 1000 (Intervener #1) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 915 (Intervener #2) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 172 (Intervener #3) v. Operative Plasterers' and Cement Masons' International Association Local Union 124, Ottawa (Intervener #4) v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 162 (Intervener #5).

Unit: "all persons employed as cement masons by the Construction Field Forces of the Generation Projects Division, and the Lines and Stations Construction Department of the Transmission and Distribution Projects Division of the respondent in Ontario, save and except non-working foremen, persons above the rank of non-working foreman, and persons covered by a collective agreement effective April 1, 1972 between intervener #1 and the respondent." (29 employees in the unit).

Number of names of persons on revised voters' list		14
Number of persons who cast ballots		15
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	11	
Number of ballots marked in favour of Operative Plasterers' and Cement Masons' International Association of the United States and Canada	3	

0128-75-R: United Steelworkers of America (Applicant) v. Parker-Hannifin (Canada) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Owen Sound, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (49 employees in the unit).

Number of persons on revised voters' list		43
Number of persons who cast ballots	42	
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	16	

0213-75-R: Ontario Nurses' Association (Applicant) v. Board of Health of the Corporation of the County of Huron (Respondent) v. Canadian Union of Public Employees (Intervener).

Unit: "all registered and graduate nurses employed by the Board of Health of the Corporation of the County of Huron, save and except supervisors and persons above the rank of supervisor." (13 employees in the unit).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of applicant	12	
Number of ballots marked in favour of intervener	0	

0233-75-R: Advanced Extrusions Employees' Association (Penetanguishene, Ontario) (Applicant) v. Advanced Extrusions Limited (Respondent).

Unit: "all employees of Advanced Extrusions Limited at Penetanguishene, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (100 employees in the unit).

Number of names of persons on revised voters' list		71
Number of persons who cast ballots	55	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	42	
Number of ballots marked against applicant	12	

0238-75-R: Canadian Union of Public Employees (Applicant) v. Ontario Municipal Employees Retirement Board (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Toronto, save and except managers persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (48 employees in the unit).

Number of names of persons on voters' list	43
Number of persons who cast ballots	39
Number of ballots segregated and not counted	3
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	16

0288-75-R: Ontario Nurses' Association (Applicant) v. The Cottage Hospital, Uxbridge (Respondent).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity at The Cottage Hospital in Uxbridge who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except head nurses and persons above the rank of head nurse." (4 employees in the unit).

Number of names of persons on voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

(BARGAINING UNIT #1 - SEE BARGAINING UNITS CERTIFIED - NO VOTE CONDUCTED).

0307-75-R: Retail, Wholesale and Department Store Union (Applicant) v. Nordic Hotel (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Elliot Lake not regularly employed for not more than twenty-four hours a week and students employed during the school vacation period, save and except managers and those above the rank of manager." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer	23
Number of persons who cast ballots	19
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7

Unit #2: "all employees of the respondent at Elliot Lake, save and except managers and those above the rank of manager, persons regularly employed for not more than twenty-four hours a week and students employed during the school vacation period." (17 employees in the unit).

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	7

APPLICATIONS FOR CERTIFICATION DISMISSED DURING JULY

No Vote Conducted

0205-75-R: Canadian Textile & Chemical Union (Applicant) v. Harding Carpets Limited (Respondent) v. The Canadian Union of Operating Engineers, Local 104 (Intervener #1) v. Textile Workers' Union of America, C.L.C./A.F.L./C.I.O., South-Western Ontario Textile Joint Board and its Local 741 (Intervener #2).

Unit: "all employees of the respondent at its Guelph plant, save and except foremen, assistant foremen, those persons above the rank of foreman and assistant foreman, fixers, quality control staff, office staff, those employees who do not work more than 5 hours per day, employees covered by a subsisting collective agreement between the respondent and The Canadian Union of Operating Engineers, Local 104 and students employed during the school vacation period." (106 employees in the unit).

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0230-75-R: Labourers' International Union of North America, Local 1081 (Applicant) v. Funcraft Vehicles Limited (Respondent) v. Group of Employees (Objectors). (46 employees).

0272-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Aacro Building Products (Respondent) v. Group of Employees (Objectors). (3 employees).

0292-75-R: The Association of Allied Health Professionals: Ontario (Applicant) v. The Etobicoke General Hospital (Respondent) v. The Civil Service Association of Ontario Inc. (Intervener) v. Employees (Objectors). (14 employees).

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0320-75-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. John Mesheau Interiors Limited (Respondent) v. International Brotherhood of Painters and Allied Trades - Local 200 Ottawa (Intervener). (10 employees).

0356-75-R: Bakery & Confectionery Workers' International Union of America, Local 426 (Applicant) v. Christie, Brown & Company Limited, Christie's Bread Division of Nabisco Limited, Nabisco Foods Division of Nabisco Ltd. (Respondent) v. Office and Professional Employees International Union, Local 131 (Intervener). (92 employees).

0389-75-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Prevost Carpet Installations (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Intervener). (5 employees).

0426-75-R: United Brotherhood of Carpenters and Joiners of America Local 38 (Applicant) v. D.L. Stephens Contracting Niagara Limited (Respondent) v. The Christian Labour Association of Canada (Intervener). (4 employees).

0437-75-R: Local Union 636, International Brotherhood of Electrical Workers, AFL-CIO-CLC (Applicant) v. Milton Hydro-Electric Commission (Respondent). (5 employees).

0449-75-R: Office and Professional Employees International Union, Local 343, AFL-CIO-CLC (Applicant) v. Hamilton Municipal Employees' Credit Union Limited (Respondent) v. Employee (Objector). (8 employees).

0464-75-R: Canadian Union of Operating Engineers (Applicant) v. MacLean Hunter Cable T.V. (Respondent). (22 employees).

0580-75-R: International Association of Bridge, Structural and Ornamental Iron Workers - Local Union #700 (Applicant) v. Standard Equipment Supply Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America Local Union #494 (Intervener). (2 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

7512-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Reliable Plastering Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Voting Constituency: "All plasterers and Plasterers Apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (29 employees).

Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener #1	13

7515-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rogers Plastering Contractors Limited (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Voting Constituency: "All plasterers and plasterers apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees).

Number of names on revised voters' list	22
Number of persons who cast ballots	16
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener #1	11

7530-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Roselawn Plasterers Co. Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo

Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Voting Constituency: "All plasterers and plasterers apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-foreman." (12 employees).

Number of persons who cast ballots	12
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of Intervener #1	6

7543-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Spring Plastering Company Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2) v. Hamilton Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #3).

Voting Constituency: "All plasterers and plasterers apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (31 employees).

Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener #1	13

7557-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Glenbow Construction Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Voting Constituency: "All plasterers and plasterers apprentices of the Respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees).

Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener #1	4

0279-75-R: Service Employees' Union - Local 210, Affiliated with Service Employees' International Union, AFL-CIO-CLC (Applicant) v. Blue Water Rest Home, Zurich, Ontario (Respondent).

Voting Constituency: "All employees of the Blue Water Rest Home at Zurich, Ontario, save and except professional medical staff, registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for more than twenty-four hours per week and students employed during the school vacation period and all employees presently covered by a current collective agreement between Service Employees' International Union, A.F.L.-C.I.O.-C.L.C., and the Blue Water Rest Home, Zurich, Ontario." (22 employees).

Number of names of persons on voters' list	22
Number of persons who cast ballots	23
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	13

0366-75-R: United Steelworkers of America (Applicant) v. Gould Manufacturing of Canada Limited, (Industrial Battery Division) (Respondent).

Voting Constituency: "All office, clerical and technical employees of the respondent (including Gould Distributions Ltd.) at Fort Erie save and except supervisors, managers, persons above the rank of supervisors and managers, chief accountant, senior electrochemist, manufacturing engineer, industrial engineer, secretary to the General Manager, secretary to the Controller, secretary to the Operations Manager, persons regularly employed for not more than

twenty-four hours per week, students employed during the school vacation period, students engaged through a co-operative programme with a university or similar institution, plant protection personnel and persons covered by subsisting collective agreement between the Respondent and the United Steelworkers of America, Local 5049." (31 employees).

Number of names of persons on voters' list	22
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	15

0367-75-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Mary's General Hospital, Kitchener, Ontario (Respondent) v. The Canadian Union of Operating Engineers, Local 104 (Intervener).

Voting Constituency: "All lay office and clerical employees of the respondent at Kitchener, Ontario save and except supervisors, persons above the rank of supervisor, confidential secretaries to the Executive Director, Assistant Executive Director, Medical Director, Director of Patient Care, Director of Hospital Services, Personnel Manager, Personnel Assistant, Technical Personnel, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (70 employees).

Number of names of persons on list as originally prepared by employer	70
Number of persons who cast ballots	62
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	41

0400-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Robert Hunt Millwork Corporation Limited (Respondent).

Voting Constituency: "All employees of the respondent at its plants in Middlesex County, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed for the school vacation period and persons employed for not more than twenty-four hours per week." (136 employees in the unit).

Number of names of persons on revised voters' list	136
Number of persons who cast ballots	127
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	69

0442-75-R: United Electrical, Radio & Machine Workers of America (Applicant) v. Allanson Manufacturing Company Limited (Respondent).

Voting Constituency: "All employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, engineering, production planning and industrial engineering, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (170 employees).

Number of names of persons on voters' list	142
Number of persons who cast ballots	135
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	74

Certification Dismissed Subsequent to Post-Hearing Vote

4880-73-R: Canadian Textile & Chemical Union (Applicant) v. Dorothea Knitting Mills Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Chief Engineers, foremen and foreladies, persons above the rank of foreman and forelady, and office and sales staff." (162 employees in the unit).

Number of names of persons on revised voters' list	160
Number of persons who cast ballots	154
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	66
Number of ballots marked against applicant	82

7479-74-R: Labourers' International Union of North America, Local 493 (Applicant) v. Adventure Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in the unit).

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	10
Ballots segregated and not counted	3
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6

0036-75-R: Canadian Union of Public Employees (Applicant) v. The Municipal Corporation of the Township of Chapleau (Respondent) v. Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent, save and except Deputy Clerk-Treasurer, persons above the rank of Deputy Clerk-Treasurer, and students employed during the school vacation period." (5 employees in the unit).

Number of names of persons on voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

0145-75-R: Canadian Union of Public Employees (Applicant) v. Municipal Corporation of the County of Renfrew (Respondent).

Unit: "all employees of the respondent in the County of Renfrew, save and except supervisors and persons above the rank of supervisor and office staff." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer	19
Number of persons who cast ballots	19
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	10

0156-75-R: Canadian Workers Union (Applicant) v. Frankel Structural Steel Limited (Respondent) v. Shopmen's Local Union No. 743 of the International Association of Bridge, Structural and Ornamental Iron Workers (Intervener #1) v. Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener #2) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its shop on Shaw Street in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, security guards and employees covered by subsisting collective agreements." (277 employees in the unit).

Number of names of persons on revised voters' list	274
Number of persons who cast ballots	246
Number of spoiled ballots	9
Number of ballots marked in favour of applicant	70
Number of ballots marked in favour of intervener #1	167

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0252-75-R: International Molders & Allied Workers Union (Applicant) v. King Seagrave Limited (Respondent).

Unit: "all employees of the respondent in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (43 employees in the unit).

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	48
Number of ballots segregated and not counted	4
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	34

0268-75-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Bestview Holdings Limited (Respondent) v. Christian Labour Association of Canada (CLAC) (Intervener).

Voting Constituency: "All employees of the respondent, in the Township of Sarnia, save and except registered nurses, supervisors, persons above the rank of supervisor, persons regularly employed for not more than sixteen hours per week and students employed during the school vacation period." (35 employees).

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	31
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	24

0291-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000, Affiliated with International Brotherhood of Teamsters (Applicant) v. Seven-Up (Ontario) Limited (Respondent).

Unit: "all employees of Seven-Up (Ontario) Limited at Burlington, Ontario, save and except supervisors, those above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in the unit).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	6

0298-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cameron McCormick (Respondent).

Unit: "all employees of the respondent in Alexandria, save and except supervisors, persons above the rank of supervisor, office and sales staff." (11 employees in the unit).

Number of names of persons on voters' list		10
Number of persons who cast ballots	10	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	6	

0308-75-R: Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. National Grocers Company Limited (Respondent).

Unit: "all employees of the respondent at its cash and carry operations at Timmins, save and except managers, and persons above the rank of manager." (2 employees in the unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	1	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	1	

BALLOT SEALED IN EXHIBIT ENVELOPE

0332-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Olsonite Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent at Windsor, save and except supervisors, persons above the rank of supervisor, sales representatives, assistant production control supervisor and quality control inspectors." (10 employees in the unit).

Number of names of persons on voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	3	

0413-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Preston Sand and Gravel Company Limited (Respondent) v. The Christian Labour Association of Canada (Intervener).

Unit: "all employees of the respondent company working at Cambridge (Preston), Ontario, save and except dispatchers, foremen, those above the rank of dispatcher, foreman, office and sales staff and students employed for the school vacation period." (19 employees in the unit).

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	9

0432-75-R: Brewery, Soft Drink, Distillery Distributors and Miscellaneous Workers, Local 100 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Seven-Up (Ontario) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Orillia, Ontario, save and except supervisors, those above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	7

0467-75-R: Warehousemen and Miscellaneous Drivers, Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. T.C.E. Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and persons covered by subsisting collective agreements." (21 employees in the unit).

Number of names of persons on voters' list		15
Number of persons who cast ballots	14	
Ballots segregated and not counted	2	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	9	

APPLICATIONS FOR CERTIFICATION WITHDRAWN DURING JULY

5004-73-R: Warehousemen and Miscellaneous Drivers Local 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Cannett Freight Cartage Limited (Respondent). (43 employees).

6028-74-R: Labourers International Union of North America, Local 493 (Applicant) v. Franki Canada Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener #1) v. International Union of Operating Engineers, Local 793 (Intervener #2). (4 employees).

0062-75-R: Retail Clerks Union, Local 486 (Applicant) v. Great Universal Stores of Canada Limited (Respondent). (7 employees).

0340-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. W. B. Sullivan Construction Limited (Respondent). (35 employees).

0433-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palace Pier Condominiums (Respondent). (8 employees).

0486-75-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Atikokan (Respondent). (27 employees).

0530-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mordini Carpentry Ltd. (Respondent). (4 employees).

0532-75-R: Labourer's International Union of North America Local Union 491 (Applicant) v. Kuzmas Construction Company Limited (Respondent). (8 employees).

0534-75-R: Teamsters Local Union 1000 (Applicant) v. 7 - Up Ontario Ltd., 5520 Murie St., Niagara Falls, Ontario (Respondent). (10 employees).

0535-75-R: Teamsters Local Union 100 (Applicant) v. 7-Up Ontario Ltd., 5520 Murie Street, Niagara Falls, Ontario (Respondent). (3 employees).

0536-75-R: Teamsters Local Union 1000 (Applicant) v. Flavorite Poultry Ltd. (Respondent). (9 employees).

0544-75-R: The Civil Service Association of Ontario Inc. (Applicant) v. South Waterloo Memorial Hospital (Respondent). (10 employees).

0545-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mordini Carpentry Ltd. (Respondent). (4 employees).

0562-75-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Delhi (Respondent). (13 employees).

0566-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Trans Western Express Division of Northern Pool Express Ltd. (Respondent). (8 employees).

0567-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 7 - Up Ontario, Ltd. (Respondent). (12 employees).

0593-75-R: United Steelworkers of America (Applicant) v. Stora Steels Canada Ltd. (Respondent). (6 employees).

0604-75-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. A. Detlor & Sons Limited Plumbing (Respondent). (2 employees).

0605-75-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Applicant) v. W.J. Roberts Plumbing & Heating (Respondent). (2 employees).

0621-75-R: International Chemical Workers Union (Applicant) v. Block Drug Co. Canada Ltd. (Respondent). (50 employees).

0657-75-R: International Association of Bridge Structural and Ornamental Iron Workers Local 721 (Applicant) v. King Steel Fabricator Limited (Respondent). (2 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS DISPOSED

OF DURING JULY

7362-74-R: United Brotherhood of Carpenters and Joiners of America, Local Union 494 (Applicant) v. Wood, Wire and Metal Lathers International Union, Local 562 (Respondent). (no employees). (GRANTED).

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7562-74-R: Lazaros Terzis (Applicant) v. Local 197 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L., C.I.O., C.L.C. (Respondent) v. Windsor Hotel (Hamilton) Limited (Intervener). (GRANTED).

Unit: "all employees of the intervener employed in the following categories, save and except supervisors and persons above the rank of supervisor and part-time employees: (a) Tapmen and Bartenders; (b) Waiters and Waitresses; (c) Janitors and Maintenance Men, (d) Chambermaids; (e) Desk Clerks." (9 employees in the unit).

Number of names of persons on voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons who names appear of voters' list	6
Number of ballots marked in favour of Respondent	6

0169-75-R: Sherwood Hugh Reid and Lloyd King (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) v. Northern Electric Company Limited, Research and Development Laboratories (Intervener). (GRANTED).

Unit: "all stationary engineers and persons primarily engaged as their helpers employed by Northern Electric Company Limited, Research and Development Laboratories at its plant in the Township of Nepean, save and except the chief engineer and persons above the rank of chief engineer." (8 employees in the unit).

Number of names of persons on voters' list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	6	

0175-75-R: Siegfried Klaus (Applicant) v. The Sheet Metal Workers' International Association, Local Union No. 562 (Respondent). (GRANTED).

Unit: "all employees of H. Boehmer & Co., Limited engaged on sheet metal work who are employed at and working out of Kitchener, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of Respondent	1	
Number of ballots marked against Respondent	8	

0222-75-R: Mike Lytwynec (Applicant) v. Retail Wholesale and Department Store Union, Local 579 (Respondent) v. Nickel City Hotel (Intervener). (GRANTED).

Unit: "all employees of Nickel City Hotel in the City of Sudbury in the beverage and cocktail lounges, save and except supervisors and persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (2 employees in the unit).

Number of names of persons on voters' list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	2	

0235-75-R: Richard Thibault (Applicant) v. United Steelworkers of America (Respondent). (GRANTED).

Unit: "all employees of Wolfe Transmission Limited in Metropolitan Toronto, save and except foremen and depot managers, persons above the rank of foreman or depot manager, office and sales staff." (52 employees in the unit).

Number of names of persons on revised voters' list		46
Number of persons who cast ballots	43	
Number of spoiled ballots	1	
Number of ballots marked in favour of respondent	9	
Number of ballots marked against respondent	33	

0529-75-R: The office employees of Wood Alexander Limited at 225 King William Street, Hamilton, Ontario (Applicant) v. Teamster's Union Local No. 879 (Respondent) v. Wood Alexander Limited (Intervener). (25 employees). (WITHDRAWN).

0538-75-R: Heather M. Sargent (Applicant) v. Office and Professional Employees International Union (Respondent). (3 employees). (DISMISSED).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS DISPOSED OF DURING

JULY

0244-75-R: Ontario Nurses' Association (Applicant) v. The Lambton Health Unit (Respondent) v. Nurses' Association The Lambton Health Unit (Predecessor Trade Union). (GRANTED).

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0380-75-R: Retail, Wholesale and Department Store Union, AFL:CI0:CLC (Applicant) v. Maple City Laundry and Dry Cleaners Limited (Respondent) v. Chatham General Workers Union, Local 330 of the Canadian Labour Congress (Predecessor Trade Union) v. Group of Employees (Objectors). (GRANTED).

0381-75-R: Retail, Wholesale and Department Store Union, AFL:CI0:CLC (Applicant) v. Interprovincial Freezers Ltd. (Respondent) v. Chatham General Workers Union Local 330, C.L.C. (Predecessor Trade Union). (GRANTED).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL DISPOSED OF DURING

JULY

0454-75-U: Wabasso Limited, Empire Division (Applicant) v. Colette Asselin, et al. (Respondents). (GRANTED).

0476-75-U: Acoustical Association Ontario, J.A. MacDonald (London) Ltd., London Acoustics Limited, Canadian Johns-Manville Ltd., W.J. Broome Plastering Limited and Actpar Limited (Applicant) v. Local Union 1316, United Brotherhood of Carpenters and Joiners of America; The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, The Ontario Acoustic and Drywall District Council, United Brotherhood of Carpenters and Joiners of America; John H. Walker, Business Agent, Local Union 1316; Tom Harkness, International Representative, United Brotherhood of Carpenters and Joiners of America; and Ken Marshall, President, Local Union 1316, United Brotherhood of Carpenters and Joiners of America (Respondent). (DISMISSED).

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0493-75-U: Patchoque Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Emile Langevin, et al (certain employees of the Applicant) (Respondents).

- and -

0542-75-U: Patchoque Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Edouard Polly et al (certain employees of the Applicant) (Respondents).

- and -

0543-75-U: Patchoque Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Jean A. Villeneuve, et al (certain employees of the Applicant) (Respondents). (GRANTED).

0509-75-U: J. Harris & Son Limited (Applicant) v. Joseph Perrault, Roger Ladouceur, Louis Larocque, Polydor Saint-Jean, Andre LeFleur, Sylvia Cleroux, and Rice Palma (Respondents). (DIRECTION).

0537-75-U: Ottawa Construction Association (Applicant) v. E. Guerinni, F. Desilva, D. Soares, A. Lanthier, A. Silva, S. Dualte, F. Melo, and other members of the United Brotherhood of Carpenters and Joiners of America, Local Union #93 (Respondents). (DISMISSED).

0540-75-U: Ottawa Construction Association (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local Union #93, and Mark McKenny and Benedict Turner (Respondents). (DISMISSED).

APPLICATIONS FOR CONSENT TO PROSECUTE DISPOSED OF DURING JULY

0112-75-U: Domtar Packaging Limited, Corrugated Containers Division (Applicant) v. Those persons named in Schedules "A", "B", "C", "D" and "E" to this Application (Respondents). (GRANTED).

0276-75-U: Retail Clerks International Association (Applicant) v. Little Bros. (Weston) Limited (Respondent). (DISMISSED).

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0439-75-U: Reed Ltd. (Applicant) v. Nicholas Rudisi (Respondent).
- and -

0440-75-U: Reed Ltd. (Applicant) v. Canadian Union of Industrial Employees (Respondent).

- and -

0441-75-U: Reed Ltd. (Applicant) v. Nicholas Rudisi (Respondent).
(DISMISSED).

0451-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. W.B. Sullivan Construction Limited and Larry Cook (Respondents). (WITHDRAWN).

0457-75-U: Wabasso Limited, Empire Division (Applicant) v. United Textile Workers of America, Local 155 (Respondent). (WITHDRAWN).

0474-75-U: International Leather Goods, Plastics and Novelty Workers' Union, Local 8, Toronto (Applicant) v. Paragon Leather Goods Ltd. (Respondent). (GRANTED).

0492-75-U: Labourers' International Union of North America, Local 493 (Applicant) v. G. Ziraldo Plastering Co. and G. Ziraldo (Respondents). (WITHDRAWN).

0523-75-U: Soft Drink Workers, Joint Local Executive Board, representing Local and Branch Unions of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (Applicant) v. MacDonald and Son (Timmins) Ltd. (Respondent). (WITHDRAWN).

0526-75-U: Stone & Webster Canada Limited (Applicant) v. Anthony J. Leonard (Respondent). (GRANTED).

0547-75-U: Patchogue Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Jean A. Villeneuve, et al (Certain Employees of the Applicant) (Respondents). (WITHDRAWN).

0548-75-U: Patchogue Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Daniel Rochon, et al (Certain employees of the Applicant) (Respondents) (WITHDRAWN).

0549-75-U: Patchogue Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Emile Langevin, et al (Certain Employees of the Applicant) (Respondents). (WITHDRAWN).

0551-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Kilmer Van Nostrand Co. Limited, Italo Filice and Frank Barich (Respondents). (GRANTED).

0613-75-U: Patchogue Plymouth - Hawkesbury Mills - A Division of Amoco Canada Petroleum Co. Ltd. (Applicant) v. Ronald Roy (Respondent). (WITHDRAWN).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE) DISPOSED OF

DURING JULY

5044-73-U: Canadian Textile & Chemical Union (Complainant) v. Dorothea Knitting Mills Limited (Respondent). (GRANTED).

7363-74-U: Colin Whiteman (Complainant) v. Morgan Adhesives of Canada Limited (Respondent). (DISMISSED).

0363-75-U: United Steelworkers of America (Complainant) v. Sealed Air of Canada Ltd. (Respondent). (WITHDRAWN).

0406-75-U: International Brotherhood of Electrical Workers Local Union 1687 (Complainant) v. Indian Bay Mechanical & Electrical Co. (Respondent). (WITHDRAWN).

0452-75-U: Labourers' International Union of North America, Local 183 (Complainant) v. W.B. Sullivan Construction Limited and Larry Cook (Respondents). (WITHDRAWN).

0482-75-U: Ontario Nurses' Association (Complainant) v. Victoria Hospital Corporation (Respondent). (WITHDRAWN).

0500-75-U: United Steelworkers of America (Complainant) v. Brampton Aluminum Products (Respondent). (WITHDRAWN).

0501-75-U: United Steelworkers of America (Complainant) v. Brampton Aluminum Products (Respondent). (WITHDRAWN).

0528-75-U: The United Steelworkers of America (Complainant) v. The Hodgson's Steel and Ironworks Ltd. (Respondent). (WITHDRAWN).

0624-75-U: Local Union 1687 International Brotherhood of Electrical Workers (Complainant) v. Noront Construction and Maintenance (Respondent). (WITHDRAWN).

0653-75-U: Local Union 1687 of the International Brotherhood of Electrical Workers (Complainant) v. Noront Construction and Maintenance (Respondent). (WITHDRAWN).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0415-75-M: United Steelworkers of America (Trade Union) v. Russel Brothers Limited, Owen Sound, Ontario (Employer). (GRANTED).

0420-75-M: International Chemical Workers Union, Local 595 (Trade Union) v. Domtar Packaging Limited, Corrugated Containers Division, Etobicoke Plant (Employer). (GRANTED).

0428-75-M: The Canadian Union of Public Employees and it's Local #26 (Trade Union) v. The Corporation of the Town of Kirkland Lake (Employer). (GRANTED).

0515-75-M: Printing Specialties and Paper Products Union, Local 466 (Trade Union) v. Reed Packaging Ltd. (formerly Acme Paper Products Company) (Employer). (GRANTED).

0594-75-M: International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (A.F.L.-C.I.O.-C.L.C.) (Trade Union) v. Charles Wilson Limited (Employer). (GRANTED).

APPLICATION UNDER SECTION 55 DISPOSED OF DURING JULY

0360-75-R: Galt Typographical Union No. 411 (Applicant) v. Kerr-Progress Printing Limited (Respondent). (DISMISSED).

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JURISDICTIONAL DISPUTE

0527-75-JD: Grant Parkinson & Associates Inc. (Complainant) v. John A. T. Pirie, Paul Santy, James Da Fonsica, (Da Fonseca), Ronald Doiron, Gaston Dasender, (Desender), United Brotherhood of Carpenters and Joiners of America, Local 2451 and Labourers International Union of North America, Local 1059 (Respondents). (WITHDRAWN).

APPLICATION FOR DETERMINATION UNDER SECTION 95(2) DISPOSED OFDURING JULY

0470-75-M: Canadian Union of Public Employees, Local 1115 (Applicant) v. Welland and District Humane Society (Respondent). (GRANTED).

REFERENCES TO BOARD PURSUANT TO SECTION 96

0318-75-M: Crane Rental Association of Ontario (Employer) v. Sarnia Construction Association (Objector) v. International Union of Operating Engineers, Local 793 (Trade Union). (TERMINATED).

0323-75-M: Ontario Erectors Association (Employer) v. Sarnia Construction Association (Objector) v. International Union of Operating Engineers, Hoisting Division, Local 793 (Trade Union). (TERMINATED).

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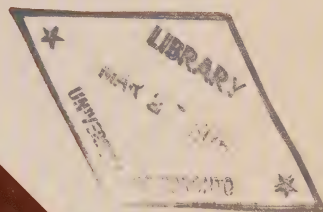
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REPORTS**

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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BEFORE: Frank V. Boscarol, Vice-Chairman, and Board Members E. Boyer and J. D. Bell.

APPEARANCES AT THE HEARING: *P. Cavalluzzo and O. Ferguson for the applicant; D. L. Brisbin for the respondent; J. Wagensveld for the intervener; Mrs. N. J. Marshall for the group of employees.*

DECISION OF THE BOARD: August 11, 1975:

4. Pursuant to the initial decision of the Board dated June 3, 1975, the Board directed that a pre-hearing representation vote be held in this matter. Since the applicant was attempting to displace the intervener which held the bargaining rights at that time, the employees were accordingly given a choice on their ballots as between the two trade unions. This vote was held on June 16, 1975, wherein of the 83 ballots cast, 78 ballots were marked in favour of the applicant while 5 were marked in favour of the intervener.

5. By letter dated June 8, 1975, Mrs. Marshall on behalf of a group of employees filed certain charges against the applicant alleging discrimination on part of the applicant trade union and that certain of its membership evidence had been obtained as the result of undue influence exerted upon the employees.

6. By letter dated July 7, 1975, the applicant responded to these allegations and after sitting out its position in this regard, further advised as follows:

"However, we request the Board to proceed with the said hearing in light of certain information which has come to our attention. In reviewing this matter we have discovered certain irregularities in some of the membership evidence which has been filed with the Board. In some cases the person designated to be the collector of the application fee did not in fact collect the said fee. However, these cases do not affect the percentage membership requirement requisite for entitlement to a vote. More importantly, this was done through innocent error. In any event, we submit that the subsequent vote which overwhelmingly reflected the employees' desire to be represented by the applicant should cure any defect in the said defective membership evidence.

We therefore advise the Board that on August 6th, 1975, the applicant will make full disclosure of these irregularities and will make representations as to how the Board should proceed with this application."

7. The evidence as adduced in this regard establishes that approximately 50 employees of the respondent attended a meeting in Hamilton with three representatives of the applicant on the evening of May 15, 1975, during which time they all signed membership cards. Mr. Oswald Ferguson, one of the union representatives, was active during the course of this meeting and shared the collection duties along with the two other representatives. At the close of this meeting, he drove two of the employees who were in attendance at

that meeting, viz. Anna Maria Alessi and Maria Liotta, to the premises of the respondent situated in Burlington. While he waited in the car on the company's parking lot, these two employees then attended the respondent's lunch room and from there to the change room where, during the supper hour, they proceeded to obtain the additional signatures of 22 employees on the afternoon shift upon the applicant's membership cards together with the required dollar fee. It is clear that these employees who are both classified as "Group Leaders" were at all relevant times on the day shift. Their testimony in this regard is to the effect that they were in a rush to perform this task as they did not wish to be caught by the respondent. Accordingly, they did not fill in the receipt portion of these cards as previously instructed but rather immediately turned the uncompleted cards over to Mr. Ferguson upon re-entering his car. It was at this time that Mr. Ferguson then took it upon himself to complete the receipt portions of these cards wherein his name is shown as the collector. He then drove the employees back to Hamilton which took approximately twenty minutes. The receipts were distributed to the signatories by these two employees the next day.

8. The evidence further discloses that Mr. Ferguson is the "District 6 President" of the applicant whose career in union matters spans some twenty-five years both on the Local and International levels. It was in this capacity that he executed his signature upon the two Form 8 declarations filed in support of the applicant's membership cards. The relevant provision as contained in these documents is Paragraph #3, which provides as follows:

"3. (Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector. EXCEPT IN THE FOLLOWING INSTANCES: "

No instances are noted in the space providing for the listing of exceptions.

9. The testimony of Mr. Ferguson is to the effect that upon receiving the uncompleted cards and the monies from the two employees he enquired and received assurances from them that they had collected the dollar from each signatory. He stated that he then signed the receipt portion of the cards as collector in their presence. He further stated that through past experience he found that such receipts had a way of getting lost and finding their way to management, and rather than exposing these employees to the potential dangers of management repercussions to such a situation, he decided to sign the cards himself. In executing the Form 8 documents, he stated that he did not realize that he should have noted this factor.

10. The historical position of the Board with respect to the execution of the Form 8 declaration has been set out in the *Collingwood Shipyards, Division of Canadian Shipbuilding & Engineering Ltd.* case OLRB Monthly Report June (1967) at p. 246. In the *Zehr's Markets Limited* case OLRB Monthly Report June (1972), p. 635, the Board stated at page 636 as follows:

"There are a number of cases before this Board dealing with Form 8 (formerly Form 9). Those cases indicate that the Board has exacted very stringent standards from applicants who submit membership evidence. These stringent requirements are necessary because the membership evidence or records of trade unions relating to membership fall within the secrecy requirements of section 100 of The Labour Relations Act. Other parties to a certification proceeding do not have the opportunity to cross-examine witnesses with respect to the membership evidence. It is in those circumstances that the Board approaches its statutory responsibility under section 7 of the Act and accordingly is extremely vigilant in ensuring the propriety of membership evidence. Since the Board in turn must rely on the evidence of membership tendered by the applicant trade union the Board has exacted strict requirements from applicant trade unions with respect to that membership evidence and particularly with the Declaration Concerning Membership Documents (Form 8).

The Declaration, Form 8, "goes to the very root of the membership evidence submitted by the applicant". *Canadian Union of Operating Engineers v. The Stanley Steel Company Limited v. The United Steelworkers of America* [1972] OLRB Rep. 181; and the cases before this Board have indicated that there must be compliance with the requirements of Form 8 and complete disclosure must be made. See e.g., *Stanley Steel Company Limited*, supra; *United Steelworkers of America v. National Steel Car Corporation Limited* [1966] OLRB Rep. 738; *Valley Transportation Company Limited* [1963] OLRB Rep. 448; *Retail, Wholesale and Department Store Union, AFL-CIO:CLC v. Dominion Stores Limited* [1964] OLRB Rep. 447; *International Association of Machinists v. Essex Wire Corporation Limited v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 141, Affiliated with the I.B. of T.C.W. & H. of A.* [1965] OLRB Rep. 490; and where compliance with the directions of Form 8 and the standards of accuracy and disclosure contained therein were not met the Board has invariably found that there is not sufficiently reliable evidence concerning membership documents."

11. Counsel for the applicant however submits that the circumstances are unique and exceptional and that the principles as adopted by this Board as set out above have no application in the instant case since the evidence of membership is reliable. In this regard, he asked the Board to consider the following factors, viz. the clear and overwhelming majority obtained by the applicant during the course of the representation vote held on June 16, 1975; the majority of the employees in the agreed bargaining unit of some 90 employees had been properly signed up and in the circumstances of this pre-hearing displacement application, the additional 22 cards in question were superfluous as they would not have, in any event, prevented the ordering of a representation vote. Mr. Ferguson's motives underlying his actions were in no way fraudulent but were directed towards the protection of these two employees; and the subsequent voluntary disclosure to the Board of the situation by the applicant. Counsel for the applicant also drew our attention to the fact that the intervener has applied for conciliation and should the Board reject the evidence of membership as submitted by the applicant, the immediate effect would be to "saddle" the employees with a trade

union they do not desire in the face of their true wishes as reflected in the representation vote.

12. The Board has carefully weighed the evidence as adduced in this regard and although we are satisfied that Mr. Ferguson's failure to properly set out the relevant information on the face of the Form 8 declaration did not constitute a fraud or that he deliberately attempted to mislead the Board, we must conclude that he was unduly lax to the point of negligence in the circumstances. As regards his motivations in preventing the two employees from affixing their signatures to the 22 cards in the capacity of collector, we find this somewhat at odds and incongruous with respect to his decision to allow and assist them to attend the respondent's premises during their off-shift hours, on the evening of May 15, 1975, following the union meeting. The evidence as adduced in this regard establishes that not only were these two employees subject to possible exposure by management, a report of their unauthorized visit was in fact given to the owner of the company, Mr. Voortman. In any event, it should also be noted that these two employees were appointed by the applicant to act as scrutineers on its behalf during the course of the taking of the vote.

13. In the result, therefore, we are not prepared, in the particular and most unfortunate circumstances of this case and having regard to the principles as set out above, to rely upon the Form 8 documents tendered in support of the evidence of membership as filed, and since the absence of a reliable declaration concerning membership documents goes to the very root of the membership evidence submitted by the applicant, we must find that the membership documents do not meet the standards of proof required by the Board.

14. Having carefully reviewed the evidence as adduced with respect to the charges as filed by Mrs. Marshall, we find on the balance of probabilities that she has failed to establish, in the circumstances, that the applicant trade union has discriminated against any person contrary to the provisions of Section 12 of The Labour Relations Act. In like manner, we further find that she has failed to establish that Anna Maria Alissi and Maria Liotta exercised managerial functions within the meaning of Section 1(3)(b) of the said Act such that they were in a position to unduly influence the employees.

15 The application is accordingly dismissed.

7579-74-U Office and Professional Employees International Union, (Applicant), v. **Weingarden & Hawrish**, (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and E. Boyer.

DECISION OF THE BOARD: August 12, 1975.

1. The applicant and the respondent have each requested the Board to give reasons with respect to its decision of May 28, 1975, in which the Board denied the applicant's request for leave to prosecute the respondent for failure to bargain in good faith.

2. The respondent took the position that the application was, in large measure, untimely because more than six months had elapsed from the occurrence of some of the events upon which the applicant relied in support of its application. In considering the granting of consent to prosecute, the Board is guided by the provisions of *The Summary Convictions Act* which provides that no proceedings can be instituted more than six months after the time when the subject-matter of the proceedings arose. The Board will not give consent to the institution of a prosecution which would be abortive because of untimeliness under the above Act. The Board may, however, in order to obtain a complete picture of the relationship between the parties during bargaining, look at the history of that relationship throughout its whole existence. It is for this latter reason that the Board entertained evidence of events which were outside the six-month limitation.

3. The applicant was certified by the Board on February 4, 1974 for all office and clerical employees of the respondent. The present application was filed on March 27, 1975, at which time the employees concerned were engaged in a legal strike which had commenced on or about September 19, 1974. Notice to bargain was given to the respondent by letter dated May 30, 1974.

4. The notice to bargain was followed by a letter from the applicant to the respondent dated June 12, 1974. The letter was accompanied by a proposed collective agreement. The respondent in turn sent to the union a draft agreement under cover of a letter dated June 22, 1974. The letter made reference to a meeting to be held on June 25, 1974. The meeting took place as scheduled and was the first bargaining session between the parties.

5. A further meeting was held on July 2, 1974. On July 12, 1974, conciliation was requested and on August 8, 1974, a meeting was held with the conciliation officer. On August 14, 1974, the parties were advised that a conciliation board would not be appointed. A further bargaining session took place on September 7, 1974. On September 19, 1974, the employees commenced a legal strike which is still in progress. The parties agreed to seek mediation services and met before an officer on October 9, 1974. A further meeting of the parties was held on November 2, 1974 and a final meeting occurred on February 1, 1975.

6. The draft collective agreement which was submitted by the respondent contained, among others, clauses with respect to the description of the bargaining unit and the employer's right to discharge employees which were unacceptable to the union. The respondent proposed to restrict the scope of the bargaining unit to union members only and proposed that the respondent have virtually absolute right of discharge. The union contended that these proposals were not only evidence of bad faith bargaining in themselves but, in addition, would require the union to act in violation of provisions of The Labour Relations Act, a fact which the union alleged further evidenced the bad faith bargaining of the respondent.

7. The particulars filed by the union indicate, and the evidence shows, that the respondent abandoned its position with respect to restricting the scope of the bargaining unit and accepted the union position on that question as far back as November 1974. It may well have been that consent to prosecute would have been forthcoming on this issue if a timely application had been made. The issue, however, was obviously settled long before the date of the present application and is untimely.

8. The particulars further indicate, and the evidence confirms, that while the original draft agreement submitted by the respondent contained a virtually unassailable right to discharge for any cause, the respondent altered its position on that matter at the meeting of February 1, 1975. The union alleged, however, that the respondent, at the meeting of February 1, 1975, insisted upon a right to discharge on the basis of personality conflict in a proposed clause which the union interpreted as meaning that a decision of amendment would be unchallengeable if the proposed clause were adopted.

9. The clause in question read as follows:

For purposes of this Article 4 personality conflict shall be considered to be a just cause for discharge. The validity of the personality conflict shall be conclusively established by the party claiming personality conflict and the other party shall accept any such discharge or resignation.

10. It was the respondent's position that the interpretation put upon the clause by the union was incorrect and that the matter covered by the clause was subject to the provisions of the grievance and arbitration sections of the proposed collective agreement. It is the opinion of the Board that the union's charge that the proposal constitutes bad faith bargaining is based upon a misinterpretation of the clause which appears to the Board to put upon the party alleging personality conflict the onus of conclusively establishing that such a condition exists. Furthermore, it is clear that the clause is subject to the grievance and arbitration provisions. In the view of the Board, the proposal does not constitute bad faith bargaining.

11. A further matter relied upon by the union as evidence of bad faith is that at the time that the respondent agreed to accept the bargaining unit sought by the applicant which, incidentally, is the unit defined in the certificate, it proposed that it should have the unilateral right to deal with merit increases for employees after the basic rates had been negotiated. The union contended that the respondent was proposing to negotiate with the employees in violation of section 59(1) of the Act and was thus bargaining in bad faith. It was the position of the respondent that its proposal involved agreement upon minimum or base rates and that it was simply seeking the right to grant merit increases as it might deem proper. The proposal cannot, in itself, be said to constitute bargaining in bad faith nor could it be a contravention of section 59(1) so long as it was to be implemented only if it became a part of the collective agreement.

12. Reliance was placed by the union in support of its application upon incidents which occurred as far back as the month of August 1974. The evidence is that during that month the respondent submitted a list of proposals to its employees. This action was taken without notification to the union office or to Mr. Robinet who, although not a union official, had been acting on its behalf in this matter. The union further relied upon the fact that the respondent gave a general increase to its employees in August of 1974.

13. Mary Ann Fox, who testified at the hearing, is an employee of the respondent. She testified that she was president of the union during August 1974 and head of the negotiations. She was an employee of the respondent during August of 1974. Mary Ann Fox is not a paid employee of the union. She said that she had had doubts about her authority as president but that she had accepted the increase. It may well have been that had the union ap-

plied for consent to prosecute at that time the circumstances would have warranted the granting of a consent on an arguable point of law. However, the union failed to take any action with respect to either of the incidents of August 1974 until the bringing of this application in March of 1975.

14. In reaching its decision of May 28, 1975, the Board has taken into account the fact that the applicant has not sought a further meeting with the respondent since the meeting on February 1, 1975, at which time the respondent made some concessions with respect to the proposed agreement.

15. In view of all of the foregoing, the Board declines the request of the applicant for consent to institute a prosecution of the respondent.

0518-75-R United Steelworkers of America, (Applicant) v. The Kendall Company (Canada) Limited, (Respondent) v. International Union of Operating Engineers Local 796, (Intervener) v. Group of Employees, (Objectors).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and P.J. O'Keefe.

APPEARANCES AT THE HEARING: *J. Alick Ryder, R. MacDowell and Pat Grasso for the applicant; Edward T. McDermott for the respondent; Doreen McDowell for the intervener; Tony Duncan for the objectors.*

DECISION OF THE BOARD: August 28, 1975

3. The parties have agreed to the following bargaining units which the Board finds appropriate for the purposes of collective bargaining:

Unit #1:

All employees of the respondent at its Curity Avenue location, Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory technicians, industrial engineers, industrial technologists, maintenance engineers, project engineers, project technologists, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and all those persons covered by subsisting collective agreements.

Unit #2:

All employees of the respondent at its Curity Avenue location, Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation periods.

Unit #3:

All employees of the respondent at its Howden Road warehouse location, Toronto, Ontario, save and except foremen and those persons above the rank of foreman, office and sales staff.

Unit #4:

All students of the respondent employed during the vacation periods at its Howden Road warehouse location, Toronto, Ontario.

4. The respondent charges that on or about the 12th day of June 1975, Connie Cavalier, an employee of the respondent, was approached by Wilfred Dabriel, an officer, official, agent or representative of the applicant. It is alleged that Dabriel attempted to coerce Cavalier to join the applicant by telling her that if she did not join the applicant she would lose her job when the applicant got in. The charge goes on to allege that, on or about July 3, 1975, Cavalier was approached by Joan Dobson, said to be an officer, official, agent or representative of the applicant, and that Dobson attempted to intimidate Cavalier by stating that if she joined the applicant it would cost her \$1.00 now but if she did not join until later it would cost her \$25.00 to join. Finally, the respondent charges that on or about July 2, 1975, the applicant intimidated numerous employees of the respondent by circulating a bulletin advising the employees of the respondent to report to the applicant anyone observed circulating a petition against the applicant. In light of these charges the respondent submits that no reliance can be placed on the membership evidence filed by the applicant and, alternatively, submits that a vote be ordered to ascertain the true wishes of the employees.

5. The group of employees opposing this application make the following charges. It is charged that the applicant used "unfair labour actions" in soliciting the employees of the respondent. More specifically it is alleged that on or about July 3, 1975, Wilfred Dabriel took a statement of desire in opposition to the applicant from Tony Duncan, an employee of the respondent, and "proceeded to crumple it up". It is further alleged that on July 4th Wilfred Dabriel "defaced [a] petition and returned it". The charges also allege that Omar Elliot, an employee of the respondent, threatened Frederick Maliksi, another employee of the respondent, by gesturing with a closed fist and stating, "Watch out, I will remember your face." And finally, it is charged that at a meeting convened on or about July 1, 1975 at "the O.F.L. Building" officials of the applicant advised employees of the respondent attending this meeting "that there prob[ably] would be some people trying to get signatures against the union and if any union member saw this [he was to] try to get the paper and tear it up".

6. Ms. Cavalier gave evidence and testified she was approached during the first part of June by "Fred" [Wilfred Dabriel]. Dabriel asked her to join the applicant and she replied that she did not care to join. The witness testified that Dabriel then told her "if I joined then it would cost me \$1.00 but if I didn't join when asked it would cost me \$25.00 and also that I might lose my job". The witness replied that if she had to pay \$25.00 that would be her responsibility, whereupon Dabriel is said to have repeated, "You could lose your job." The witness ended the conversation by stating she would wait and see. She did not report the incident to her supervisor and did not consult with any official of the applicant to determine

whether the statements were true. Further, it is clear that Dabriel and Cavalier knew each other before this interchange, having worked side by side on previous occasions.

The witness further testified that on or about Wednesday, July 2, 1975, Joan Dobson, an employee of the respondent, inquired if anyone had asked her to join the union and whether she had received a card. Cavalier told her she did not want one and did not care to join. Cavalier told the Board that Dobson then told her if she didn't join by Friday it would cost her \$25.00.

The witness reported this incident to her supervisor the same day and "asked him if it was right". Cavalier also said she spoke to him at the same time "about losing my job". The supervisor inquired into these matters and reported back that "it could not happen". Ms. Cavalier did not sign a membership card.

7. Joan Dobson did not give evidence – Wilfred Dabriel did. Dabriel has worked for the respondent for three years. His signature appears as the "collector" on twenty-eight membership cards. Joan Dobson's name does not appear on any card in this capacity. Dabriel attended a number of organizational meetings convened by the applicant and admitted to having approached Cavalier. However, he told the Board, "I talked to her about becoming a member." She replied, "I don't think I want to be a member." He then claims to have said, "[I]t is up to you", and went on his way. He denied threatening her in any way and denied the same in regard to any other employee approached during the period of organizational activities. He did not know Joan Dobson and did not think she was a member of the applicant's organizing committee.

8. The following document was admitted into evidence with the agreement of all parties:

"July 2nd, 1975

TO ALL PLANT EMPLOYEES OF THE KENDALL COMPANY

On Thursday, June 26th, 1975, our National Office filed an Application for Certification at the Ontario Labour Relations Board on your behalf.

According to the Ontario Labour Relations Act, we must have at least 65% of the employees as members for a successful application. We are pleased to announce that your application is based on an overwhelming majority of the employees at Kendall being members of the Steelworkers.

We wish to take this opportunity to express our sincere thanks to each and everyone for having made this campaign a success. We urge all of our friends who have not signed a membership card as yet – to sign up now.

BE CAREFUL

We have to point out at this time that if you want certification by the Department of Labour as soon as possible – **DO NOT SIGN ANY PETITION AGAINST THE UNION** if such is requested of you by some of your “Fellow Workers”. Many companies are using these delaying tactics to campaign against the Union.

If you see such a petition being circulated during working hours, report it immediately to the foreman and to the Union. It is very important that you report the incident to the foreman and the Union.

WE WOULD LIKE TO REMIND ANYONE THAT MAY WANT TO START A PETITION AGAINST THE UNION THAT SUCH ACTION WOULD APPEAR TO BE CONTRARY TO THE COMPANY POLICY AS STATED ON PAGE 19 OF YOUR EMPLOYEES HANDBOOK “SOLICITATIONS”.

Non-members who sign a petition do not affect the Union’s position, but each Union member who signs a petition, reduces the Union’s numerical position by one. However, only if enough Union members sign the petition to reduce our majority below the 65% is the petition effective.

SO, IF YOU WANT TO BE CERTIFIED AS SOON AS POSSIBLE – DO NOT SIGN A PETITION!

This is a trick exercised by Management all over Ontario.

In addition to the meeting which will be held on **WEDNESDAY, JULY 2nd, 1975 AT THE O.F.L. BUILDING, 15 GERVAIS DRIVE, DON MILLS AT 8:00 P.M.**, as soon as we are certified, a meeting of all employees will be called to elect your proposals for a Contract. The elected Committee will meet the Company as soon as possible to negotiate your proposals. Remember, all proposals that we present to the Company will be approved by you and you, as members of the Steelworkers, will vote to accept or reject any contract that your Committee negotiates for you – all of this is done by Secret Ballot.

We hope that you have received your membership card – if not, give us a call and we will forward you one.

You will not regret your spontaneous step to join the best and largest Union in Canada.

Again, thank you for your support and wishing you all the best.

Yours Fraternally,

(sgd) 'Pat V. Grasso'

Organizing Director
United Steelworkers of America"

9. Donald Mayne gave evidence on behalf of the applicant. He is a law student and engaged in summer work with the applicant. He worked on the Kendall organizational campaign full time. He told the Board that he stood outside the main gate at the Kendall plant for a month prior to the filing of the application for certification. He believed that every employee who passed him by came to know who he was and who he represented. He was dressed in a suit and tie; he held a "Steelworkers" clip board in his hands; and his brief case was marked with a Steelworkers emblem. He attended at the main gates at the time of shift changes and spent his evenings performing "house to house work".

He told the Board he became aware of the "\$25.00 rumour" from employees who asked him about its truth and on each occasion he denied that it was true.

He did not recall any rumours about "the loss of jobs".

As for the above reproduced notice, he testified that the application for certification was filed on June 26, 1975 (July 8, 1975 was set as the terminal date) and "the green sheet" was posted on July 1, 1975. Accordingly, the applicant believed that by July 2, 1975 "it was high time to let the employees know what was happening". This was a difficult thing to do verbally outside the plant and therefore a letter was chosen as the mode for communication. Accordingly, 600 copies of the above notice were reproduced and distributed to the three shifts on July 2, 1975. After distributing the letter no complaint was made by the respondent to the applicant to the best of Mayne's knowledge.

It was said that the letter emphasized the respondent's no solicitation rule for two reasons. First, it was believed that an employee had been discharged in June for the violation of this rule by soliciting on behalf of the applicant. It therefore wanted the rule to be uniformly applied. Secondly, the applicant wanted access to any evidence that the rule was not applied uniformly to others. It was hoped that such evidence would "scotch" any petition in opposition to the applicant.

On cross-examination Mayne denied that the applicant was interested in having the names of employees who had signed a "petition" – it was only interested in the names of those circulating such a document in contravention of the plant rules.

10. Frederick Maliksi gave evidence. Maliksi has been employed by the respondent for a short time – in fact Maliksi has only been in Canada six months, recently emigrating from the Philippines. It was his evidence that during the second week of June a person named "Ken" approached him in the disposable diaper room and asked him if he would like to join the union. Maliksi says he told "Ken", "I cannot join because I am new to this country". The same person is said to have approached him again the next day and received the same reply. Then the following day, at the beginning of the day shift, Maliksi claims to have been approached by both "Ken" and Omar Elliot, another employee of the respon-

dent. Elliot asked him "if [he] had signed" and Maliksi said, "No way." Whereupon Elliot is alleged to have said, "Watch out - I'll remember your face", and he made a fist. Maliksi told the Board, "They gave me a card - I signed - I signed the card because I am afraid - Ken is a big guy."

On cross-examination Maliksi said he signed the card about nine o'clock in the morning and gave the card to "Ken" together with \$1.00. The following day Ken gave him a receipt. He said he did not report the threat to his foreman because he did not want to reveal his trade union membership. At the hearing the Board informed the parties that Maliksi's membership card was dated June 11, 1975; the receipt was also dated June 11, 1975; and the signature of a John Fidler appeared as "the collector".

Following this incident, according to Maliksi, he signed a statement of desire in opposition to the trade union "on Friday night" - although the document bears the date of Thursday, July 3 - and on Sunday, July 6, he signed a letter written by Tony Duncan outlining the above events. Duncan wrote the letter because, to use Maliksi's own words, he "cannot make a nice sentence". Duncan is an employee of the respondent.

The Board notes that while Maliksi said he didn't know Ken's last name - his letter reads "Ken Norton".

11. Omar Elliot gave evidence in reply to this charge and Steve Hector, president of Steve Hector Real Estate Limited, provided the Board with character evidence on Elliot's behalf. The Board is satisfied that Hector is a very responsible person in the Toronto community. He has known Elliot for fifteen years - in fact Elliot lived in his house for over a year. He has never seen him exhibit violent tendencies.

Elliot has worked for the respondent for four years. He was hit by a car three years ago, breaking both legs and injuring a shoulder. As a result of this accident he limps and is unable to run. Maliksi weighs about 120 lbs and Elliot weighs about 130 lbs. Elliot admits to talking with Maliksi in the morning in question but his version of the incident is quite different. Elliot asked him if he had signed a union card and Maliksi reportedly gave him a puzzled look. Therefore, according to Elliot, he walked over to him and gestured a writing motion on asking again. Maliksi nodded in the affirmative, smiled, and Elliot says he said, "Right on, brother", gesturing a clenched fist - a gesture he intended as an act of jubilation. Elliot said he had known Maliksi for a couple of months prior to this and subsequent to the incident they appeared to be on friendly terms.

The locker room, where the incident occurred, has 20' x 50' dimensions and Elliot says others were close enough to notice a threat if it had been made.

On cross-examination Elliot admitted Ken Joseph was in the locker room but he did not recall either a discussion between Joseph and Maliksi or Maliksi signing a card at that time. He also denied having given Maliksi a membership card. He admitted to being active in the organizing campaign and the membership evidence filed by the applicant bears this out.

12. Ray Osmond has been employed by the respondent for six months. He testified about a meeting he had attended about July 2, 1975. The meeting was convened by the ap-

plicant and was publicly announced in the above described letter. It was held at the Ontario Federation of Labour Building on Gervais Drive in Toronto and was attended by some twenty-five employees. Osmond says that Dabriel was present at this meeting. It was not disputed that the meeting was chaired by Mr. Pat Grasso, the Toronto area organizing director for the applicant, and Mayne was present as well.

Osmond testified that Grasso told the employees that if there was a petition against the union and "they got a chance to see the petition" they should tear it up. Otherwise they were to "sign against the petition" and they were given another form on which to do so. According to Osmond, someone asked what the company could do (if a petition was destroyed) and Mayne said there was nothing it could do. Grasso is reported to have agreed.

On cross-examination the witness admitted that the statement discredited the United Steelworkers of America as an organization but he also admitted to signing a membership card immediately after the statement had been made. However he explained that this was done out of "frustration and anger" so he "could get back" by "signing against them". Osmond's letter to the Board is dated July 7, 1975 and was mailed, with his consent, by Tony Duncan. Finally, Osmond stated that there was every opportunity to sign a statement of desire or petition if an employee so desired.

Grasso gave evidence at the hearing. He denied instructing employees to tear up petitions. The meeting was called "to bring the employees up to date"; to explain the effect of petitions on the application; and to explain what would happen after either the applicant was certified or a representation vote was ordered. Questions then came from the floor in regard to the powers of the respondent company if an employee tore up a petition. The question was said to have followed a report that a woman who had begun to circulate a petition in opposition to the applicant tore it up in disgust when no one would sign it. Mayne responded to the question by saying he could not see what the company could do. Grasso denied suggesting that such a course of conduct was a good idea but admitted that the employees were not instructed that the action was improper.

Grasso admitted the applicant was opposed to petitions against the application but he said it did not receive the names of anyone signing such documents and it was not interested in obtaining their names. According to him, all the applicant wanted was the names of employees who violated the company rules in circulating such documents – this is what the above letter was designed to achieve.

13. Tony Duncan has been employed by the respondent for eight years. He testified that on July 3, 1975 he was standing outside the respondent's main gate for the purpose of soliciting signatures in opposition to the trade union. He was standing near Mayne in the admitted hope that it would interfere with Mayne's activities. He testified that as the employees were leaving the plant about 3:30 p.m. Wilfred Dabriel approached him and asked for the paper he was holding. Duncan gave him the paper and Dabriel folded it up in his hands and walked away, laughing. Mayne smiled after this happened. Duncan testified he had no other paper so he could not continue the soliciting. Mayne apparently had paper which was not offered or asked for. Duncan told the Board if he had other stationery he might have been able to "put this union down".

On July 4, 1975 Duncan was again standing at the main gates and as Dabriel left the plant Duncan asked him if he would like to sign a petition against the applicant. Dabriel said he would and then scribbled on the document handed to him. On cross-examination Duncan admitted that he was in effect “setting a trap” for Dabriel because, to use his words, he realized Dabriel was “a militant type person”. In fact Duncan interrupted a discussion with two women because he wanted to bait Dabriel and thereby cause an incident in front of the ladies.

Following this, Duncan attended the plant gates on July 5th and July 6th. On July 9th he left the plant “around noon” to mail all the statements of desire. He requested permission to leave from his supervisor and was gone for one and a half hours. He was paid for this time.

The Board received a good deal of evidence in regard to Duncan’s substantial efforts to obtain support against the applicant but finds it unnecessary to recite the details.

14. Counsel for the respondent emphasized that everyone is free to join a trade union or refuse to join a trade union. Moreover, the Board’s procedures were said to recognize the right of an employee to change his mind – a change that “clouds” the reliability of the membership evidence. Further, it was pointed out that section 61 specifically outlaws intimidation and coercion in organizational activities. Accordingly, the respondent submitted that the techniques used by the applicant were such as to cast a doubt on all of its membership evidence and that this Board should either dismiss the application or, at the very least, order a representation vote. In this regard the respondent relied upon *Walter E. Selck of Canada Ltd.* [1964] OLRB Rep. June p. 138; *H.R. Wesson Ltd.* [1968] OLRB Rep. Nov. p. 811; *L.M. Welter Ltd.* [1965] OLRB Rep. April p. 34; and *Milnet Mines Ltd.* 53 CLC 17,063. He emphasized that Dabriel and Elliot had been active in the applicant’s organizational campaign and suggested that the appropriate test was what had been done in respect of other membership cards. It was submitted that if this question could not be answered the application should be dismissed. It was further suggested that the applicant’s letter to the employees would intimidate a reasonable employee from opposing the application. Finally, it was submitted that the applicant had instructed employees to destroy petitions and in so doing had deprived an unknown number of employees of the right “to take back” their union membership.

15. Counsel for the applicant prefaced his argument with the observation that a very large bargaining unit was affected by the application and, in light of this fact, he submitted that the officials of the applicant had taken all reasonable steps. He said that in an application of this kind there was bound to be incidents caused by inexperience. Thus if the Board were to demand too high a standard in the conduct of organizational activity it would be impossible to organize a unit of this size and achieve a fundamental right granted by the Act – the right to certification without a representation vote.

More specifically, he argued that Cavalier was not being frank with the Board. He found it odd that she would wait three weeks to report Dabriel’s threat if it had been made or if she had been frightened. Moreover, she had reported only to her supervisor after Joan Dobson had spoken with her. The trade union publicly denied all the rumours that it knew of, and finally, she did not sign a membership card in any event. He found all the cases relied upon by the respondent to be distinguishable on the facts.

As for the rumour that it would cost more to join the trade union after a certificate was granted he submitted that he knew of no case where the Board had held such a statement improper.

The applicant's letter was said to be accurate and not capable of deterring a reasonable employee from exercising rights under the Act. It was stressed that the applicant has a right to investigate circumstances in the way the letter suggests. It was also submitted that Duncan was in no way hindered by the first incident with Dabriel and the second incident he, himself, provoked.

Finally, the applicant suggested that Maliksi misunderstood Elliot and that, in any event, his evidence was very unreliable because of its lack of spontaneity and Duncan's involvement.

16. In all cases alleging improper trade union conduct the Board first begins by assessing the nature of the conduct – the test being would it deter the reasonable employee? If the answer to this question is in the affirmative the Board must go on to assess the possible significance of the conduct and in this regard the identities of those persons involved are very important. Where the action impugned is that of a responsible official of the trade union a single indiscretion may cause the Board to conclude that it cannot place reliance on any of the evidence of membership submitted by the union. Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the actual cards involved may be disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members. (See *Webster Air Equipment Company Ltd.* 58 CLLC para. 18,110; *Walter E. Selck of Canada Ltd.* [1964] OLRB Rep. June p. 138; *Linhaven Home for the Aged* [1962] OLRB Rep. May 66.)

17. In *Canadian Electric Box and Stampings Limited* [1964] OLRB Rep. Sept. 284 the Board was confronted with two allegations similar to the charges made against Dabriel in this case. Certain employees in the proposed bargaining unit threatened the future employment of other employees of the respondent if they refused to join the union. No officer or official of the union made any threats of any kind to any of the employees. The second type of allegation was that certain employees who were soliciting union membership on behalf of the applicant told other employees that if they did not join the union and pay a \$1.00 initiation fee prior to the union becoming certified as bargaining agent, it would cost them between \$25.00 and \$75.00 after certification. In regard to the first allegation the Board emphasized that union officials had not condoned the intemperate acts and no pattern of such statements could be discerned. More importantly, the statements were made by persons who obviously had no authority over the employees and had no way to achieve the consequences of the statements. These aspects of the decision read:

“No officer or official of the union made any threats of any kind to any of the employees. We do have evidence from five of the employees called by either the respondent or the objectors in opposition to this application, no suggestion was made to them that non-union employees might lose their job after certification of the applicant. The statements were made by persons who obviously had no authority over the three employees and no way to carry out the consequences of the statements.

The statements were made by persons who were known to be rank and file employees and who were not officials or representatives of the union. The persons against whom the allegations were made were not the persons who signed up the witnesses making the allegations. No allegations were made against the people who actually signed up these witnesses as union members.

We have evidence from at least one witness called by the objectors in opposition to this application that a union official at a union meeting attempted to dispell false rumours.

We are of the opinion that while there was general talk by employees in the plant concerning what a union could or could not do, and while the employees in the excitement of the campaign may have made extravagant statements, there is nothing before us from which we could draw the inference that there was any intimidation or coercion with respect to the employment of non-union members.

We are further of opinion that the statements concerning employment were not made at the instance of the union. Having regard to the manner and context in which the statements were made by employees who had no official capacity in the union and no authority over other employees, we are impelled to find that no reasonable person would have been intimidated or coerced by them.

Where a union has not authorized, encouraged or condoned intemperate statements or rumours but on the contrary its officials at union meetings have attempted to dispel false information the union cannot be held accountable for every statement made by rank and file employees during the heat of an organization campaign.

The evidence concerning the statements made by employees was not such as to lead us to find that there was any pattern of such statements. Even if membership evidence of the applicant was reduced by deleting the cards signed by the three persons to whom the statements were made, the applicant would still have in excess of fifty-five per cent of the employees as members."

As for the second charge the Board observed that there is nothing in *The Labour Relations Act* to prevent a union from reducing its initiation fee during an organization drive to facilitate the signing of union members and thereafter charge a larger initiation fee as provided for by its constitution. It went on to hold:

"... If a union can do this, then the suggestion that it will do so cannot of itself be an unfair labour practice especially where the suggestion is made by persons who are not officers or representatives of the union. In any event, such suggestions could not be construed as threats since the persons making them were known to have no power to enforce them. In this case, the Director of Organization of the applicant union

stated at a union meeting that the initiation fee would not be increased after certification.

The conduct of the employee members of the applicant against whom the above allegations were made in this case is not the type of conduct which in our opinion, could be classified as intimidation or coercion of the type found in the *Milnet Mines Limited Case*, Canadian Labour Law Reporter, Transfer Binder '49-'54, ¶17,063, *Canadian Fabricated Products Limited Case*, Canadian Labour Law Reporter, Transfer Binder '49-'54, ¶17,090, in which case threats were made which were of a type which could reasonably be carried out and would have adversely influenced the average employee."

It is of note that, as in the *Canadian Electric Box* case, officials of the applicant attempted to dispel the rumours that came to their knowledge.

In *Green Giant of Canada Limited* [1973] OLRB Rep. June 376 the Board again dealt with a situation in which one employee told another he would either lose his job or have to pay a fine later. The applicant had not condoned the impugned recruiting tactics; and the statements made by "fellow employees" could have been easily checked. The Board dismissed the charges in writing:

"15. Brian Croft testified that he was told by Jean Doehn and John Lefolhock that if he did not sign a union card he would either lose his job or have to pay a fine later. He then signed a card. This witness stated that he was aware that under some union contracts employees have to belong to the union. He said, however, that he took the organizer's statement at its face value and did not make any inquiries until later on when he found that the statements were not entirely valid.

16. In the testimony of the witnesses there was evidence of confrontations and heated arguments which took place after the signing of the cards. These arose quite naturally between employees who were in favour and those who were opposed to the union and in the opinion of the Board cannot be given significance in relation to the charges.

17. As we have already observed, there is nothing in the evidence in any way implicating the applicant in the recruiting tactics adopted by these employees who undertook to sign up union members. The statements of the effects of non-membership made by the organizers were on the evidence, of their own devising. They were made by employees to fellow employees, described in several instances as "friends" of these complainants. The statements may well have been misleading although they were somewhat qualified in the case of McFeggan and Croft, but they could have been as readily checked before the signing as the evidence shows they were afterwards.

18. The Board finds that the actions of the employee organizers were not such as would unduly influence a reasonable employee and do not

constitute intimidation, coercion or threats within the meaning of the Act. The charges are accordingly dismissed.”

Other cases with similar holdings are *Max Factor and Co.* [1964] OLRB Rep. Feb. 616; *Fabrica Manufacturing Ltd.* [1969] OLRB Rep. June 353 and *Kitchens of Sara Lee (Canada) Ltd.* [1964] OLRB Rep. April 44.

18. On the other hand in *Walter E. Selck of Canada Ltd.* [1964] OLRB Rep. June 138 the union’s organizational campaign was under the sole direction of a rank-and-file employee. She had signed up all but three of sixty-two membership cards and two employees testified that she told them if they refused to sign and the union got in they would be without a job. These witnesses also stated that they informed other employees of this. After the organizer did not refute the charges the Board dismissed the application and wrote:

“On the evidence before us the threats in question were clearly, in our opinion, contrary to the provisions of section 52 of The Labour Relations Act and, therefore, they did constitute unfair labour practices. Our experience in such matters compels us to take cognizance of the fact that the question as to whether a person was or was not influenced to sign a petition or a union card by threats of economic reprisal, is often more reliably ascertained from the objective facts as a whole than from mere subjective assertions from witnesses given later. However, even if we were to find, as argued by counsel for the applicant, that the particular two employees in question, as it turned out, were probably not in fact influenced by the threats of economic reprisals made by Mrs. Angel, we are not persuaded that we should or can disregard them. In this respect we have no assurance that employees other than the two in question did not sign cards under and as a result of the knowledge of such threats being made to the two persons in question or of similar threats being made to them by Mrs. Angel.”

In *L.M. Welter Limited* [1965] OLRB Rep. April 34 a representative told at least two employees that if they joined the applicant now, it would be at a special rate, and, further, “if they didn’t want to have anything to do with the union they would be out of a job.” The Board found that the employees took the last statement seriously and decided it could give no weight “to membership evidence filed by the applicant on behalf of these employees”. This ruling was sufficient to dismiss the application.

In *VR/Wesson Limited* [1968] OLRB Rep. Nov. 811 an organizer told an employee he would be “the first man fired” when the union was certified. The organizer was not a fellow employee but was the financial secretary of the local union of the applicant at another plant. He had signed up seven of the applicant’s twenty-three members. Relying on *Milnet Mines Limited* 53 CLLC ¶17,063 the Board concluded it was unable to accept as satisfactory proof of membership any of the documentary evidence filed by the applicant.

Finally, in the *Milnet Mines Limited* case, (*supra*), representatives of the applicant trade union threatened to assault several employees of the respondent as “part of a deliberate and calculated scheme to put the organizers of the intervener in fear and to drive them out of town”. The Board concluded that conduct was of such a nature that men of ordinary fortitude and convictions would be inhibited from joining the intervener.

19. A reading of these cases demonstrates the Board's sensitivity to the realities of organizational activity. Improper conduct on the part of union officials may be symptomatic of much broader unlawful actions. Moreover, threats by trade union officials have a ring of malice that is qualitatively different from the disfavour of a fellow employee caught up in the "heat" of campaign activity. A fellow employee's threat is likely to be recognized for what it is – "an isolated outburst by a hot-headed partisan". Further, such persons are seldom capable of carrying out their threats and for this reason men and women of ordinary convictions are not likely to be inhibited from exercising rights under the Act.

For example, in *VR/Wesson, Walter E. Selck and L.M. Welter*, the persons engaged in improper conduct were people uniquely situated to act upon their statements and the breadth of their organizational activities had been significant. The people in these cases could not be characterized as ordinary "fellow employees". Whereas, in *Canadian Electric Box and Stampings Limited* and *Green Giant of Canada Ltd.* the trade unions had not "shut their eyes" to the activities of their supporters – activities between employees in a familiar work place. In such circumstances, stories can be checked and supervisors can respond to any excesses, if need be.

As observed in *Dupont of Canada Ltd.* [1961] OLRB Rep. 360, it would be unwise for the Board "to act as a censor of social pressures used to persuade employees to join or not to join the union or to oppose or not to oppose a union unless the pressure is of such a nature that it places a person's employment in jeopardy either directly or by implication". A contrary position would be oblivious to human nature and result in artificial standards that would adversely affect the rights of all employees under the legislation.

20. Viewed in this light, the charges against Dabriel, Dobson, and the trade union cannot adversely affect the weight to be attributed to the membership evidence filed by the applicant.

It was not established that Dobson played any role in the organizational activities, save for approaching Cavalier. And, if Dabriel did speak to Cavalier as alleged, we do not believe she was coerced in any way nor do we think any other reasonable employee would in the circumstances. Both statements (the loss of job and increased membership fee) could be checked with trade union officials standing outside the main gates and with supervisors in the immediate vicinity. Moreover, the employees involved knew each other and would sense the partisan salesmanlike nature of the statements. In fact, Cavalier's delayed reaction is evidence of her true concern for the incidents.

We do not believe that Dabriel's childish actions outside the main gates were likely to deter employees of ordinary convictions, although we do not condone them. Nor do we condone the failure of the applicant's officials to stipulate the impropriety of such conduct at the meeting of July 2, 1975. However, it was not established that the tearing up of the statement of desire was anything more than an isolated incident of a "hot head". We do not believe Duncan was in any way impeded by Dabriel's actions. We cannot take his "lost opportunity" argument seriously in the face of evidence that the very next day he attempted to provoke a similar incident. As Osmond admitted, anyone who wanted to sign a petition opposing the trade union could.

Finally, we find nothing improper in the applicant's letter to employees dated July 2, 1975. The letter does no more than communicate the applicant's attitude and approach to petitions. This message is in no way surprising or improper. The applicant claimed it did not want to know the names of those employees signing petitions and no evidence was adduced that it tried to obtain such information. Moreover, we do not believe that a reasonable employee would think this to be the purpose of the July 2, 1975 letter. Again, realistic standards must be drawn in such matters.

21. This brings us to the exchange between Maliksi and Elliot. The evidence is in direct conflict. The incident occurred on June 11, 1975 and Maliksi's membership card bears that date. Moreover, Elliot admits that Ken Joseph was in the locker room at the time. These facts tend to corroborate Maliksi's assertion. On the other hand Maliksi is new to the company and this country. He has difficulty with writing the English language and he had difficulty understanding the questions put to him when giving evidence. Further, it is difficult to conceive of a 130 lb man who is just recovering from a major accident realistically threatening someone only 10 lbs lighter – although Maliksi emphasized that “Ken was a big guy”. (However, it was Elliot who he says threatened him.) Judging from Maliksi's demeanour in the witness stand he may have a low tolerance to conflict oriented situations – a natural trait for someone who is new to the country and has difficulty appreciating not only the tone of conversation but its very content.

However, in the circumstances we do not think it necessary to determine which employee is telling the truth or whether the incident was really all a misunderstanding. If the threat was made we think it can only be characterized as an isolated incident involving an employee – not a trade union official. At 130 lbs, and just recovering from two broken legs, Elliot is not likely to have used this approach generally. Moreover, no other incident was reported. Accordingly, this alleged incident cannot adversely affect the weight to be given to the applicant's membership evidence, save for Maliksi's card. Because of the doubt surrounding Maliksi's membership card, the card will be ignored.

The final issue in this case also arises out of Mr. Maliksi's testimony. In cross-examination Maliksi testified that he signed a card and paid \$1.00 to “Ken” – presumably Ken Joseph. The next day “Ken” gave him a receipt. The Board examined Maliksi's membership card and informed the parties that the card was dated June 11, 1975 and John Fidler had signed as collector. After the case had been closed and in the middle of his argument counsel for the respondent raised the fact that Fidler's name appeared as collector although Maliksi testified he paid his dollar to “Ken”. He took the position that the union should have cross-examined on this point and called the Form 8 declarant to explain why this irregularity had not been revealed. Without this additional evidence, counsel submitted that the application ought to be dismissed in that the Form 8 was defective. Alternatively, he took the position that the Board ought to inquire into the irregularity on its own initiative.

The applicant replied that the respondent had closed its case without making charges and it was therefore too late. It was submitted that it was the responsibility of the respondent to charge that the Form 8 was defective and produce evidence in regard to the charge. It had not done so.

23. It should be noted that the Board will not undertake an inquiry of its own in the absence of charges alleging defective membership evidence. It is in this way that the Board seeks to maintain the secrecy of membership evidence, although a subsequent public hearing may be necessitated by the Board's initial investigation. Further, it is well known the Board will only undertake its own inquiry when the allegations involve non-pay or non-sign – situations that immediately suggest a potential fraud upon the Board. Such conduct, if proven, is viewed as so contrary to the Board's processes that the Board will undertake its own inquiry at any time. (See *Alcan Colony* [1963] OLRB Rep. June 159; *Acu Forming* [1970] OLRB Rep. July 480.) And in such inquiries the Board will subpoena the Form 8 declarant in order to ascertain why such improper activity was not revealed. On the other hand, charges of undue influence or misrepresentation must be alleged and proven by the party making the charge. (See *Alcan Colony*, (*supra*).)

However, there can be defects in membership evidence, other than those involving non-pay and non-sign, which raise questions about the accuracy of the Form 8 and which in turn may affect the weight to be given to all the membership evidence. The Board requires that membership evidence be submitted in a certain form and one of the requirements is a receipt to be signed by the person who collects the \$1.00 directly from the member. This requirement assures the Board that \$1.00 was in fact paid – recognizing that only the Board scrutinizes the accuracy and veracity of membership evidence. Further, in paragraph 3 of Form 8, the declarant makes the following declaration as further assurance of the validity of the membership evidence:

“(Where the documentary evidence consists in part of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgment of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:”

It has been held that the Form 8 declarant is obligated to make full and meaningful inquiries to provide himself with sufficient information to sign Form 8 and if he fails to do so in this regard all the membership evidence may be rejected by the Board. (See *National Steel Car Corporation Limited* [1966] OLRB Rep. 738; *Stanley Steel Company Limited* [1972] OLRB Rep. 181.)

But it is essential to observe that these other irregularities may not be as related to a potential fraud as are non-pay and non-sign defects. For example, the potential indirect pay situation raised by Maliksi's evidence does not affect the fact that he joined the applicant and paid his \$1.00. But if the practice were allowed it would undermine the reliability of membership evidence generally (unless each employee is called to give evidence as Maliksi was). Furthermore, it is important to note that the Board almost always discovers such defects after commencing a non-pay or non-sign inquiry. In such circumstances it usually goes on to examine the Form 8 declarant already subject to the Board's subpoena. The issue

of when the Board will conduct its own inquiry in the face of evidence or allegations raising these other “irregularities” exclusively has been dealt with on a case by case basis and no general rule is possible. However, one important factor in the determination is the apparent extent of the irregularity.

In *W.N. Construction Ltd.* [1968] OLRB Rep. 458 it became apparent during the course of the hearing that a large number of employees had been signed up by one individual while someone else’s name appeared as collector on all of the cards save for the Form 8 declarant’s own card. As soon as this evidence arose the Board conducted its own inquiry which involved an examination of the Form 8 declarant. As a result of this investigation it arrived at the following conclusion:

“It is clear that there is a duty on the applicant to take all the necessary precautions and care to ensure that the information contained in the evidence of membership as well as the Form 54 is true and accurate. In this case nearly half the applications for membership are not true and accurate, as the person shown as the collector of the initiation fee was, in fact, not the collector. In light of all the evidence, we find that Thomas was inexcusably lax in not taking those steps which easily could have avoided the present situation. It is important to note that it was only as a result of the evidence of the first witness called by the Labourers Local 527 that the false information on the application for membership cards and the misleading information contained in the Form 54 came to the Board’s attention.”

On the other hand in *North York General Hospital* [1974] OLRB Rep. Feb. 108, in the course of a non-pay/non-sign inquiry the Board discovered that the situation was in fact one of an isolated indirect pay. Satisfied in this regard the Board informed the parties that it would not be calling the Form 8 declarant as its own witness. Although given the opportunity to do so, none of the parties chose to tender any further evidence. Accordingly, when one of the parties later submitted that it was incumbent on the Board to satisfy itself that the requirements of Form 8 had been fulfilled, the Board ruled that the document had gone unchallenged. It wrote:

“11. In the aforementioned case the Board was faced with the situation where at least three cards were in fact found to be deficient on the basis that the person shown as collector was not the *de facto* collector. This is not the situation confronting the Board as we are satisfied with the propriety of the membership card as filed. As was indicated to counsel for the intervener, it was open to him to call Mrs. Chisholm who was available to give evidence in the event that he should see fit to challenge her Form 8 document. It has been the recent practice of this Board to subpoena the signer of the Form 8 document in “non-pay” or “non-sign” situations generally with the view to clarifying any possible discrepancies in the evidence which may cast doubt upon the veracity of the statements contained in the said Form 8 document. In the instant case, as distinguished from the situation depicted in *The Stanley Steel Company Limited Case* (supra), we find that the evidence as adduced does not call into question the propriety of the statements con-

tained in the Form 8 document and it was on this basis that for the purposes of the Board's inquiry, we did not consider it necessary to call upon Mrs. Chrisholm in this respect. Having regard therefore to all of the circumstances of this case and taking into account the effect of Mrs. Shorepe's "certificate" as described in Paragraph #7 herein, we are not prepared to now extend our inquiry into circumstances surrounding the taking of the Form 8 declaration. This document therefore remains unchallenged and must be taken on its fact, and we are therefore, for the purposes of these proceedings, prepared to rely upon Mrs. Chisholm's representations as contained therein."

24. What is important in the facts at hand is that an apparent isolated irregularity was revealed on the cross-examination of Maliksi. At that time no charge was made; Form 8 went unchallenged; and the applicant did not bring any evidence forward to refute the irregularity. In the light of these events the Board remained silent and it should therefore have been clear to all parties that the Board would not be conducting its own inquiry into the irregularity. It must be emphasized that the irregularity appeared to be isolated, unlike the *W.N. Construction* case, and could easily have gone undiscovered by a conscientious Form 8 declarant given the misunderstanding that often arises over the collector's true function. (See *Puritex Knitting Co. Ltd.* [1972] OLRB Rep. 676.)

25. None of the parties sought to adduce further evidence and no one questioned the Board's failure to act. Accordingly, for the sake of procedural certainty and expedition, both parties must be deemed to have closed their case. The Board can only act on the evidence now before it.

26. The evidence suggests that John Fidler signed four cards as collector (including Maliksi's card). The applicant failed to adduce any evidence to suggest otherwise. Therefore all of these cards, other than Maliksi's, may not satisfy the Board's requirements and must be ignored. And Maliksi's card is to be ignored on other grounds. However, the Form 8 has gone unchallenged and must be accepted on its face.

27. Having regard to all of these findings the revised lists of employees and membership evidence for the respective bargaining units are as follows:

28. a) **Bargaining Unit #1**

Total number of employees on revised Schedule "A"	416
Total number of employees on revised Schedule "D"	45*
Total number of employees employed in the bargaining unit on the date of application	461
Membership evidence for employees in the bargaining unit	321**
Overlap of membership evidence by statements of desire in opposition to application	19

Total membership in bargaining unit accepted by the Board and unaffected by statements of desire	302
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Minimum membership requirement for outright certification	300
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*Original Schedule "D" containing 57 names was reduced by 10 names under "30 day rule" and 2 names were transferred to bargaining units #2 and #3.

**This figure is the result of a careful re-examination of the membership evidence. This re-examination placed three cards in the bargaining unit that had initially been designated as "lost". This figure does not include the cards signed by Fidler, including Maliksi's card.

Accordingly, the statements of desire are dismissed.

29. And in regard to bargaining unit #1 the Board is satisfied on the basis of all the evidence before it that more than sixty-five per cent of the employees of the respondent in bargaining unit #1, at the time the application was made, were members of the applicant on June 26, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

30. A certificate will issue to the applicant with respect to bargaining unit #1.

31. **b) Bargaining Unit #2**

Total number of employees on revised Schedule "B" (total number of employees employed in the bargaining unit on the date of application)	21
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Membership in bargaining unit accepted by the Board	10
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Minimum membership requirement for outright certification	14
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32. Accordingly, in regard to bargaining unit #2 the Board is satisfied on the basis of all the evidence before it that not less than thirty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on June 26, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

33. A representation vote will be taken of the employees of the respondent in bargaining unit #2. All employees of the respondent in bargaining unit #2 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

34. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent in bargaining unit #2.

35. The matter is referred to the Registrar.

36. c) **Bargaining Unit #3**

Total number of employees on revised Schedule "A"	14
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Total number of employees on revised Schedule "D"	1
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Total number of employees employed in the bargaining unit on the date of application	15
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Membership evidence in bargaining unit accepted by the Board	13
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Minimum membership requirement for outright certification	10
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37. Accordingly, in regard to bargaining unit #3 the Board is satisfied on the basis of all the evidence before it that more than sixty-five per cent of the employees of the respondent in bargaining unit #3, at the time the application was made, were members of the applicant on June 26, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

38. A certificate will issue to the applicant with respect to bargaining unit #3.

39. d) **Bargaining Unit #4**

Total number of employees on revised Schedule "B" (total number of employees employed in the bargaining unit on the date of application)	3
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Membership in the bargaining unit accepted by the Board	0
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40. Accordingly, the application as it pertains to bargaining unit #4 is dismissed.

3967-73-U Winston Hart, (Complainant) Mister Leonard Limited, (Respondent)

3968-73-U Cassilla Knight, (Complainant) v. Mister Leonard Limited, (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and J. E. C. Robinson, Q.C.

APPEARANCES AT THE HEARING: *Wallace Fram for the complainants; J. P. Sanderson and S. C. Bernardo for the respondent.*

DECISION OF THE BOARD: August 5, 1975.

1. The parties consented to the substitution of Rory F. Egan for J. D. O'Shea, Q.C., as Chairman for the purposes of hearing the submissions of the complainants with respect to compensation after re-employment.

2. The parties hereto were unable to determine the amount owing the employees concerned from the date of the decision of a Board differently constituted directing the reinstatement of the employees to the date of their actual re-employment. A further question was raised and argued before the Board with respect to the deduction of income tax from the compensation directed to be paid. It was urged that the compensation directed by the Board amounted to damages and that there should be no deduction of income tax.

3. On the evidence, the Board finds that the compensation due the complainants was properly calculated by the respondent as covering the period from the date of discharge to October 1, 1973.

4. The following represents the position of the Board with respect to the question of deductions of income tax from compensation awards directed by the Board following reinstatement of an employee.

5. The purpose of the Board in directing the payment of compensation is to restore the employee concerned, insofar as it is reasonably practical, to exactly the same financial position he would have been in if he had continued to earn wages during the period of his enforced absence. That is to say, the intent of the Board is that the reinstated employee is to receive his normal "take-home pay" for the period in question. The amounts set out by the Board in directing payment of compensation are simply base or gross amounts from which it is expected the employer will withhold the sums normally deducted from the employee's pay in the usual course. The Board's intention with respect to deductions applies to the normal amount deducted from an employee's pay for income tax purposes and in addition any other statutory or contractual deductions. The compensation is intended to result in the restoration of the financial status quo and is not designed to ensure a profit to either of the parties concerned.

6. In the result, therefore, there is full compliance with the Board's intent when the employer concerned pays to the reinstated employee the amount set out in the Board's award, less the normal sums, including income tax payments, ordinarily deducted from the gross pay of his employees, with the result that the employee concerned obtains his lost take-home pay.

7. The amounts proposed by the employer in the present instance comply with the direction of the Board.

7465-74-R Employees, (Applicant) v. International Woodworkers of America, (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members P. J. O'Keeffe and J. E. C. Robinson, Q.C.

DECISION OF THE BOARD: August 8, 1975.

1. The respondent has requested the Board to provide reasons for its decision of April 30, 1975, and to reconsider the decision. The reasons of the Board are set out below.

2. The evidence in support of the petition was given by Louis Kelly and Bruce Sears, employees of Domtar Woodlands Limited.

3. Insofar as the question of the origination of the petition is concerned, it is abundantly clear from the uncontradicted testimony of witnesses for the petition that it was the outcome of considerable dissatisfaction on the part of the employees with the union and that it had been a matter which had been generally discussed for some time before its implementation. The Board accepts the evidence of the witnesses in support of the petition that no one on management's side had anything to do with the origination of the petition, and, furthermore, that it expresses the voluntary wishes of the employees concerned.

4. In making the above findings, the Board is aware of the fact that Sears testified that a person, whose name was not disclosed, had suggested that Sears take up the petition. The Board finds that this evidence has no other significance than to simply explain why Sears was the one out of the group of disgruntled employees who initiated the necessary action for the carrying out of the general intent of the employees in seeking to terminate the bargaining rights of the respondent. The Board, to reiterate, is satisfied that the petition with respect to origination and the manner in which the signatures thereto were obtained was free from the hand of management and that it expresses the voluntary wishes of the employees.

5. In reaching this conclusion, the Board is aware that the petition comprises three unattached sheets, only one of which carried a heading indicating the purpose of the petition. That heading reads "Removal of Present union". The page carrying the heading bears seventeen signatures of persons who are shown on the lists filed by the company as employees. The lists filed by the company show a total of thirty-eight names. Of these, twelve appear on Schedule "A" as comprising the employees in the bargaining unit on the date the application was made, i.e., March 10, 1975. The remaining twenty-six names are listed on Schedule "C" as being on lay-off on the date of the application. The latest date of lay-off for any employee on Schedule "C" is January 10, 1975. The expected date of recall of these employees is shown on the schedule as being "indefinite". These employees are, therefore, not included in the count.

6. Of the twelve employees on Schedule "A", seven have signed the page of the petition which bears the heading referred to above. It is upon these facts that the Board based the finding that is set out in paragraph 2 of the decision of April 30, 1975.

7. Insofar as the matter of custody of the document is concerned, the evidence is that upon completion of the taking of the signatures, Bruce Sears, one of the employees who appeared as a witness in support of the application, entrusted the petition to his son who had it photocopied at the local school and returned it to Sears the same day. The Board is satisfied that the petitioners retained custody of the document throughout the period when the signatures were obtained and is further satisfied that the photostatic copies were forwarded to the Board by Sears who retained the original in his possession.

8. The Board, having in mind the inherent dangers of the acceptance of photocopies, was careful to satisfy itself by an examination of the document filed by the petitioners and through the evidence of the witnesses themselves that the photostat was a true copy of the original document and accepted it in the circumstances.

9. A question was raised at the hearing as to who had inscribed the heading on the document. The witness Sears testified that he had written the heading. At the request of the respondent, he rewrote the heading for the purpose of comparison. There was no expert evidence adduced before the Board with respect to the handwriting and comparisons had to be made without such assistance. The Board found, on comparing the handwriting, that if there was any difference between the specimens, it was so slight that it could not be said to constitute a refutation of the direct testimony of Sears that the handwriting on the petition was his own.

10. The respondent attacked the credibility of the witnesses, particularly with regard to time elements relating to the origination of the petition, the period during which it was said to have been circulated, and the apparent lapse of time between those events and its eventual filing with the Board. The Board finds that while the evidence in this area may have lacked clarity, the worse that can be said of it was that the witness was somewhat confused about the time elements. The Board is satisfied, however, that this confusion goes neither to the validity of the petition nor the credibility of the witness.

11. Finally, the Board would point out that its decision in this matter is based, to a considerable degree, upon its unhesitating acceptance of the truth of the evidence adduced by the witnesses for the petitioners. The Board was careful to examine the demeanour of the witnesses in the box and the manner in which they gave their evidence, directly and under cross-examination.

12. The foregoing are the reasons underlying the decision of the Board dated April 30, 1975. The Board does not deem it advisable to vary or revoke that decision.

0352-75-U Carlos Mendata Samuels, (Applicant), v. Retail, Wholesale Bakery and Confectionery Workers Union Local 461 of the Retail, Wholesale and Department Store Union (A.F.L.-C.I.O.-C.L.C.), (Respondent) v. Rowntree Mackintosh Canada Ltd., (Intervener).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members F. W. Murray and P. J. O'Keeffe.

APPEARANCES AT THE HEARING: *Michael F. Smith for the applicant, H. Buchanan for the respondent and R. A. Peacock for the intervener.*

DECISION OF THE BOARD: August 11, 1975.

2. The complaint has been filed under section 79 of The Labour Relations Act. The complainant complains that he has been dealt with by the respondent contrary to the provisions of section 60 of The Labour Relations Act. More specifically, the complainant alleges that his union steward Horst Mons refused to enter a grievance on his behalf in respect of the dismissal of the complainant from employment with the intervener without just cause.

3. The complainant requests that a grievance be filed and a hearing granted with respect to the propriety of his dismissal and, if necessary, that the case go to arbitration.

4. The respondent denies that the complainant was refused the right to grieve his discharge from the intervener.

5. The complainant gave evidence and the respondent called Horst Mons, Charles O'Sullivan, William Mac Neil, Peter Rae and Horace Knight as witnesses.

6. The complainant stated that he had a meeting with Peter Rae the production manager on April 16, 1975, and that he was no longer working for the intervener. His last employment was with the intervener and he worked there for one year and five months. He worked as a trucker with a transport truck lift. In his job he moved from one department to another pushing the truck lift. On April 16, he had a meeting with Rae. He filed a grievance about an incident concerning Adam Fritz who was a fellow worker. Fritz received a one day suspension whereas the complainant received a two day suspension. There was a meeting in the afternoon and present at the meeting were Horst Mons and Horace Knight. Mons is the zone steward of the complainant's department and Knight is the assistant personnel manager. The purpose of the meeting centered around this grievance which the complainant had filed and which was not settled. Mr. Samuels alleged that Fritz attacked him on March 19. There were no blows merely an argument and the complainant was disciplined for it. The incident occurred while the complainant was working.

7. On April 16, the complainant met Peter Rae. The complainant was on the fifth floor at about 6:45 p.m. After the complainant had finished emptying cream into a kettle, he saw Rae and Mary Calleja, who was the supervisor of the fifth floor, standing by a swing door. As the complainant was about to go through the doors, he hesitated because they were standing immediately before the swinging door. Rae saw him standing there and he came up and opened the swing door. The complainant thought he opened the door for

Mary Calleja to go through. The door was then closed and the complainant was still standing there. Another man went through the swing door and the complainant gave him the priority to go through. The complainant was waiting for three minutes prior to the other man going through it. For these three minutes, Rae and Calleja stood in front of the swing door. Rae left the door and spoke to a man called Howie, who is an oven operator. As the complainant was about to move on, Rae came to him and asked him what he was waiting for. The complainant stated that he did not answer and pushed the bogie from where he was standing in the direction of the swing door.

8. Mr. Samuels testified that about ten yards on the other side of the swing door, he felt a hand on his arm and he was turned around by Mr. Rae. The complainant testified that Rae told him to consider himself fired and that he should go and punch out his card. The complainant informed the Board that Rae told him that if he did not leave the plant, he would get the police to take him out. The complainant testified that he informed Rae that did he realize that he was assaulting him to which Rae replied that the complainant must leave and punch his card. Rae then accompanied the complainant at the elevator. The complainant gave evidence he did not have the opportunity to speak to the union steward because there were no union stewards on the shift which the complainant worked. The complainant gave evidence that when the elevator reached the second floor, Rae grabbed his uniform to go one way and the complainant stated that he wanted to go to his department and punch out. This occurred at approximately 7:03 p.m. The complainant testified that he told his left hand that he was fired and he went to the change room to get his things and left.

9. Mr. Samuels testified that at the time he left the plant he had no chance to speak to a union steward. He was called at home by telephone and told to go back to the plant and get his final papers. He received this telephone call at about 11:30 a.m. on Thursday, April 17th, from Horace Knight. The complainant gave evidence that he went to Knight's office at about 2:00 p.m. and that Knight told him that if he did not like the decision of the company, he must file a grievance. The complainant testified that he was aware of the grievance procedure and that he told Knight that he was not going down to the plant to converse with the union steward because it is stated in the contract that during working hours you are not supposed to do this. At this point, Knight telephoned the foreman of his former department and asked him to send the zone steward. This was done immediately. The complainant gave evidence that Knight put him in a room so that he could talk to the zone steward Horst Mons.

10. The complainant informed the Board that he said he wanted to file a grievance on his dismissal and that Mons said to him that according to what Rae and Bill MacNeil, who is the Chief Steward, told him he had no case. The complainant informed the Board that he asked Mons what he was paying his \$7.83 a month for. According to the complainant, Mons stated that Rae was his boss, the complainant's boss and any other worker's boss. The complainant testified that at this point he left the plant. The complainant was asked by his counsel whether Mons ever said that he would not file a grievance. The complainant stated that Mons hesitated and said he would not file a grievance because he did not have a case. The complainant stated that Mons explained all the reports he had from Rae and MacNeil and that Mons' understanding of the incident was the same as that of the complainant. Mr. Samuels stated that when he left that morning, it was clear to him that the respondent was not going to file a grievance. The complainant then reported the matter to the Ontario Labour Relations Board on the following Monday, April 21.

41. The central issue to this complaint is whether Mr. Samuels requested the respondent to file a grievance with respect to his dismissal by the intervener on April 16, 1975. Mr. Samuels testified that he asked Mr. Mons to file a grievance and Mr. Mons gave evidence that Mr. Samuels did not ask him to file such a grievance. It is by reviewing all of the evidence that the Board is able to arrive at a conclusion on this vital question.

42. Mr. Mons' evidence that he told Mr. Samuels that he could file a grievance over his dismissal is supported by the evidence of his conversations with Mr. MacNeil and Mr. Knight. Both of these witnesses gave evidence that Mr. Mons informed them that he so advised Mr. Samuels. On the balance of the evidence the Board finds that Mr. Mons did inform Mr. Samuels that he could file a grievance over his dismissal.

43. It is also the unchallenged evidence of Mr. Rae and Mr. Knight that Mr. Samuels did not trust the union and that he would rather go outside the respondent's procedure. However, apart from the allegations in the instant complaint there is nothing before the Board to indicate any basis for Mr. Samuels' lack of trust in the respondent. Similarly, there is nothing in the evidence before us to indicate that Mr. Samuels would not receive justice from the respondent and the intervener.

44. In our view, Mr. Samuels misinterpreted the remarks and advice of Mr. Mons during their meeting on April 17, 1975. It may well be that during this meeting Mr. Samuels expected Mr. Mons to be supportive of his reaction to his dismissal by the intervener. However, Mr. Mons expressed his views about the merits of Mr. Samuels' case. It appears that Mr. Samuels may have interpreted Mr. Mons' remarks as a rejection of his position over the suspension and the dismissal. On the evidence before it, the Board finds that there is no reasonable basis for such an interpretation by Mr. Samuels.

45. Counsel for the complainant argued that the Board ought to view with caution the fact that Mr. Mons had filed only one grievance. The answer to this point raised by counsel for the complainant is that there was no evidence before the Board concerning the performance of other stewards of the respondent and there was no evidence regarding the relative sizes of the various departments within the intervener's operation. In our view, there is no significance to the fact that Mr. Mons had filed only one grievance during his terms as a steward for the respondent.

46. Section 60 of The Labour Relations Act places a duty of fair representation by the respondent towards Mr. Samuels. It does not prevent a free expression of views by the respondent or its representatives. There is no duty on the part of the respondent not to speak candidly to employees in the bargaining unit. Section 60 does require the respondent not to act in a manner that is arbitrary, discriminatory or in bad faith. On the evidence before it the Board finds that Mr. Samuels has not been dealt with by the respondent contrary to the provisions of section 60 of The Labour Relations Act.

47. In the result, this complaint is dismissed.

0627-75-R International Union of Operating Engineers, Local 793, (Applicant) v. Code 1 Investments Inc., (Respondent).

BEFORE: R.A. Furness, Vice-Chairman, and Board Members J.D. Bell and E. Boyer.

DECISION OF THE BOARD: August 21, 1975.

1. In this application for certification the applicant filed two applications for membership accompanied by receipts. The applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of at least \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply and a list of employees but did not file specimen signatures.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The Board further finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act.

5. The Board further finds that all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

6. The Board has considered the report of the Examiner dated August 8, 1975, and the representations of the parties.

7. For the reasons set forth in the decision of the Board in Board File # 0 28-75-R, decision dated August 21, 1975, the list for the purposes of the count consists of:

Adonie Bandiera and Morris Gazee

8. The respondent has requested a hearing of this application by the Board and in support of this request has stated that it wishes to have ascertained before the Board that all persons who signed union cards were familiar with the English language and therefore were fully aware of the purpose of the cards which they signed.

9. In applications for certification which are filed under the construction industry provisions of The Labour Relations Act, the Board need not hold a hearing. Reference is made to section 91(13) of The Labour Relations Act.

10. The respondent has requested a hearing of this application on what appears to be merely a doubt in its mind that some of the employees who are affected by this application did not fully understand the purpose of the membership cards which they signed. It appears to the Board that the inquiry which the respondent wishes to embark upon is essentially speculative in nature. There are no allegations before the Board that in fact the employees did not understand the purpose of signing the membership cards and the respondent has not filed any particulars with respect to what may arguably be improper or irregular conduct. The requirement for particulars is set forth in section 47 of the Board's Rules of Procedure. In any event, section 100(1) of The Labour Relations Act states:

"The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union."

Having regard to the circumstances of this application, the Board finds no reason to disclose to the respondent the names of the persons who have signed membership cards in the applicant. Having regard to the speculative nature of the respondent's position and to the provisions of section 100(1) of The Labour Relations Act, the Board is of the view that no useful purpose would be served in holding a hearing of this application. In the event that the respondent is of the view that the Board has erred in a material respect, it is open to the respondent to request the Board to reconsider its decision pursuant to the provisions of section 95(1) of The Labour Relations Act.

11. The Board is satisfied on the basis of all the evidence before it that more than sixty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 24, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A certificate will issue to the applicant.

0539-75-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. **Wix Corporation Limited**, (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES AT THE HEARING: *H. C. Anderson and H. Powers for the applicant; T. Storie and F. E. Meyers for the respondent.*

DECISION OF THE BOARD: August 20, 1975.

3. The respondent in its reply to the application submitted that the application was premature and should be dismissed. The respondent is currently in the process of transferring its operations from its Curity Avenue facilities in Metropolitan Toronto to its facilities in Pickering located on Brock Road. Because of the resultant build-up of employees it is argued that at the date of the instant application there was not a representative group of employees at Pickering. In the alternative, it is submitted, having regard to the circumstances, that the bargaining unit proposed by the applicant is inappropriate. Rather, the respondent suggests that the appropriate unit ought to encompass a comprehensive unit of employees located at both facilities.

4. The circumstances forming the basis of the respondent's submissions are relatively straightforward and without dispute. The respondent is engaged in the business of manufacturing oil, air, gas and diesel fuel filters for the automotive, aviation and industrial markets. Until November 21, 1974, the respondent carried on its manufacturing, warehousing and distribution operations at its facilities in Metropolitan Toronto. Upon opening its new plant in Pickering the respondent completed the first phase of its programme to relocate its operations. The transfer from the Curity Road plant to the Brock Road facility is programmed in phases covering a period of approximately five years. As of the date of the filing of the instant application on July 2, 1975, the warehousing and distribution operations of the respondents' enterprise have been relocated and one production line is presently in operation. Another line is scheduled to be transferred in October, 1975, another in May, 1976, and ultimately the entire production capacity should be relocated by December 31, 1978.

5. The two plants are separated by a distance of eighteen miles. Employees working out of the Metropolitan Toronto plant have been invited to follow the respondent's move to Pickering. The respondent's current hiring practice is to engage residents of Pickering for its Toronto plant so that their transfer can be expeditiously made. On the date of the application the respondent indicated that forty-three persons were employed in the bargaining unit proposed by the applicant trade union. At its optimum capacity 275 employees have been engaged at the Curity Avenue plant in Toronto; at the date of the application there were 235 employees. Upon completion of the final phase of the programme the respondent anticipates that subject to market fluctuations approximately six hundred employees will be working out of the Pickering facilities. Counsel conceded that the exact number of employees at the new plant was dependent upon sales forecasts over the period of time contemplated in completing the projected phases for relocation. He did indicate with some certainty, however, that the new facility by its completion date would at least house the present employment capacity of approximately 275 to 300 employees located at the Curity Road facility. The respondent indicated that approximately 90 employees would be added to the work force at Pickering upon introducing the two production lines in October, 1975, and in May, 1976.

6. The applicant trade union has filed thirty-four membership cards in support of its claim for bargaining rights on behalf of the forty-three employees engaged by the respondent at Pickering on the date of the filing of the application. We were also informed that the employees at Toronto at one time were represented for collective bargaining purposes but bargaining rights appear to have lapsed since consummation of the last collective agreement in 1958.

7. The principles underlying the Board's policy on "build-up" were explained in some detail in *The Emil-Frant and Peter Waselovich* case 57 CLLC ¶18,057 at p169. In brief, the build-up policy is an attempt to balance the rights of existing employees to representation for collective bargaining purposes with the rights of future employees to select a bargaining agent of their free choice upon the likelihood that a substantial increase in the work force will take place within a reasonable period of time. The Board's concern for the rights of future employees is premised on the assumption that in the event bargaining rights are conferred a trade union on the basis of an unrepresentative constituency the new employees would have to wait "a considerable period of time because of the provisions of *The Labour Relations Act* relating to termination of bargaining rights", before their views may be expressed. It is in this context that the Board requires that it be satisfied that the employer's programme for the increase in its work force take place "within a reasonable period of time". In the circumstances described herein the Board is satisfied that application of the build-up principle would not be appropriate. We are of the view that the lengthy period of time that would elapse before the anticipated increase in the work force is to take place is subject to influences so inherently beyond the control of the respondent, such as the fluctuations of the market, that the rights of existing employees would be prejudiced should we accede to the respondent's representations. (See; *The Travelaire Trailer Manufacturing Ltd.* case OLRB M.R. November 1970 829; *The Cameron Packaging Inc.* case OLRB M.R. November 1972 988; *The Canadian General Electric Company Ltd.* case OLRB M.R. 1965 363).

8. Alternatively, counsel submitted the "sounder solution" to the difficulties raised before the Board would be to describe the appropriate bargaining unit to include employees at the respondent's facilities in both Toronto and Pickering. In support of this submission, counsel mentioned that the two plants were administered and managed as one operation, that there was a functional integration of the facilities and that the wages and other working conditions of employees were identical. It was conceded that but for the transfer of employees as the programme for relocation progressed there was no significant interchange of employees between the plants. In this regard, it was also admitted that as of the date of the application employees performing certain job functions and filling particular job classifications at Toronto were not employed in a like capacity at Pickering. Nevertheless, it was argued that in accordance with the principles cited in *The Usarco Ltd. Case* OLRB M.R. September 1967 526 the Board ought to find the one comprehensive unit appropriate notwithstanding the factor of geographic separation.

9. The Board's practice with respect of defining geographic limitations to the appropriate bargaining unit have been recited in many of its past decisions. Generally speaking, the past practice of the Board has been to describe the geographic area of bargaining units in applications for certification, other than applications relating to the construction industry, in terms of the particular municipality in which the business of the respondent employer is located. The appropriate municipal area may be a city, town, village or township depending on the circumstances of the individual case. (See; *The National Grocers Company Limited* case OLRB M.R. May 1973 262 at p263). In situations where an employer has employees at more than one location in a general geographic area, the Board has taken into account a number of factors in determining what constitutes an appropriate bargaining unit. More particularly the Board considers whether there is interchange of employees between locations, the number of employees and the type of operation carried on in each location, the history of the bargaining unit in the particular type of operation and the desires of the parties. (See; *The Gypsum Company Ltd.* case OLRB M.R. July 1967 345 at p346). In

some undertakings such as the retail food markets, variety chain stores and brewers' warehousing stores where the employer operates at more than one location within a geographical area the Board has defined the bargaining unit to include all locations within that geographic area. (See; *The Goodyear Service Stores* case 65 CLLC ¶16,019 at p692; 65 CLLC ¶16,027 at p712). Nevertheless, it has never been the Board's practice especially in the absence of evidence of a regular interchange of employees "to include employees in widely separated localities in the same bargaining unless there are compelling reasons for doing so ..." (See; *The Wittiches' Bread Limited* case OLRB M.R. January 1969 1019 at p1020). Thus where an employer operated a retail food outlet in Kitchener, Ontario, and a warehousing operation in Waterloo, the Board notwithstanding evidence of a functional interdependence of operations declined to determine the appropriate unit to include employees at both locations. (See; *The Zehr's Markets* case OLRB M.R. September 1968 601). And where an applicant trade union suspected the employer was about to transfer its operations outside the township where the business was being conducted at the time of the application, the Board refused to accede to the request to expand the bargaining unit to include the geographic area encompassed by the county. (See; *Perimeter Industries Ltd.* case OLRB M.R. March 1973 174 at p175). In a like manner, the Board refused the request of an applicant trade union to expand the bargaining unit to include an area covering the township where the employer's retail operations were within the boundaries of a village. (See; *The National Grocers Company Ltd.* case OLRB M.R. May 1973 262).

10. There are exceptional circumstances where the Board has included more than one municipality within the scope of an appropriate bargaining unit. In such cases, the Board has concluded that it would do violence to an employee's right to representation for collective bargaining purposes to deny him inclusion in the appropriate unit even though located in a neighbouring municipality. (See; *The Wittiche's Bread Limited* case OLRB M.R. January 1969 1019 at p1020). Or upon the amalgamation of the respondent's health unit operations heretofore carried on at two separate geographic locations the Board was satisfied it would undermine the purpose of the consolidation of the enterprise to deny finding a comprehensive unit as being appropriate for collective bargaining purposes. (See; *The Board of Health of the York-Oshawa District Health Unit* OLRB M.R. February 1969 1178). And indeed where it was learned that upon an application being filed at the respondent's premises in Metropolitan Toronto the respondent was relocating its operations to the Town of Vaughan within a two month period from that date the Board acceded to the request to define the bargaining unit to include both municipalities (See; *The Parker Bros. Games Ltd.* case OLRB M.R. October 1968 728). Indeed, in large geographic areas such as the municipality of Metropolitan Toronto the Board has recognized the futility of limiting bargaining units to borough municipalities and has encompassed the appropriate bargaining unit to include the Metropolitan area. (See; *Perimeter Industries Ltd.* case OLRB M.R. March 1973 174) And provided employees' rights of self-organization have not been prejudiced and all other factors incidental to determining the appropriate bargaining unit have been established, the Board has not been reluctant in exceptional circumstances from finding a geographic area comprehending a regional municipality or parts thereof including a number of municipalities as appropriate for collective bargaining. (See; *The Adams Furniture Co. Limited* case (unreported) June 1975 Board File No. 7352-74-R).

12. Having reviewed the Board's general policy considerations with respect to limiting the geographic scope of the appropriate bargaining unit, we have concluded that the respondent has not demonstrated compelling reason for departing from that practice. In the

first instance in the absence of a capacity for the regular interchange of employees we are not satisfied that as of the date of the filing of the application and having regard to the dissimilar nature of the respondent's operations at both facilities that there exists a shared community of interests of employees at the two locations. In this regard had it been demonstrated that the relocation of the totality of the respondent's operations was to have taken place within a shorter period of time then there may have been some basis for determining a community interest of employees notwithstanding the requirement for a period of transition. But the information before the Board indicates that the transfer of operations is to be protracted over a period of approximately three years from the date of the application. And in the interim the employees recruited by the respondent are just as likely to be assigned to the Toronto plant as to the Pickering plant to perform their particular job function. In other words, we have not been convinced of a functional interdependence of both operations to persuade us to find that bargaining units could not co-exist separate and apart from each other during the period of time in which the relocation is to be completed. And the Board notes that there has been a history of collective bargaining (albeit a quiescent one since 1958) for employees located at the respondent's Toronto operations. Finally, the Board is of the view that if we acceded to counsel's submissions we would be interfering with the rights of employees at both locations to organize (or not to organize) and select a bargaining agent of their own choice. In instances where the Board has found the wider geographic area appropriate there was evidence before it demonstrating the representative support of employees to be included in that unit. In the circumstances before us the employees at Toronto have not even been approached with a view to expressing their desire to be included in the bargaining unit proposed by the respondent. To find that bargaining unit appropriate on the basis of the information before us would compel the Board to base its decision on reasons dependent upon the respondent's programme for relocation that may or may not be realized for some years in the future. In other words, the rights of employees to be represented for collective bargaining purposes cannot be premised on such an ephemeral basis. And assuming this programme does reach completion at the suggested target date and the resultant increase of employees does take place, the Board is satisfied that by that time all employees in the bargaining unit will have the opportunity to test the applicant's representative capacity having regard to the relevant provisions of *The Labour Relations Act* (See; sections 5 and 49).

13. The Board therefore finds that all employees of the respondent in Pickering, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

14. The Board is satisfied on the basis of all the evidence before it that more than sixty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on July 10, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

0335-75-R Canadian Independent Automotive Union, (applicant) v. Chrysler Canada Ltd., (Respondent) v. Ontario Nurses' Association, (Intervener).

BEFORE: T.E. Armstrong, Q.C., Chairman, and Board Members P.J. O'Keefe and J.E.C. Robinson, Q.C.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C. (decision of Majority reported in July O.L.R.B. Rep.): August 19, 1975.

I regret that I am unable to agree with my colleagues in the finding that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act* without prejudice to the respondents' contention that foremen and general foremen are not employees within the meaning of *The Labour Relations Act*.

In registering my disagreement, however, I must concede that certain of my remarks overlap *inter alia* with the question of the appropriateness of the unit, the question of whether the "members" of the purported union are employees under the Act, and the question of the degree of managerial participation in the formation of the applicant organization.

In this regard it would seem to me that any determination upon the question of the status of the organization is so interrelated to some of the questions hereinbefore mentioned, that a finding at this time of trade union status is, at best, illusory and premature. Notwithstanding such initial reaction it is my intention to comment on the issue existing at the present time.

At the outset it is necessary for me to set forth the unit for which the applicant seeks to bargain. Its application is for a unit composed of "all employees of the respondent at its plants in Windsor, Ontario, engaged as general foreman, foremen, save and except supervisors and persons above the rank of supervisor, office and sales staff".

It is significant also to refer to certain sections of the applicant's constitution.

Article I, entitled "Definitions", states:

"In this Constitution:

"EMPLOYEE" – means any person employed by the Company, save and except persons covered by subsisting collective bargaining relationships between the Company and any other trade union.

Article IV, "Membership"

1. "Eligibility" – Membership in the Union shall be open to all Employees of the Company."

It is apparent from a reading of the definition of "employee" in the constitution and from the eligibility provisions contained in such document, that at least two interpretations may be made therefrom. In a literal sense, neither interpretation would seem to cover explicitly the unit applied for by the applicant.

If one were to take a literal and expansive view of the definition of “employee” and the eligibility provisions from the constitution, one would of necessity conclude that the organization was capable of admitting into membership *all* persons employed by the company (save those persons covered by subsisting collective agreements). Thus persons such as the President, the General Manager and senior members of the managerial hierarchy could belong to the same union as the production workers, the labourers and the maintenance men. Such a state of affairs would obviously defeat the purpose and intent of *The Labour Relations Act*. This latter position was taken by Counsel for the respondent and his submission was that as a result thereof, the constitution precludes the applicant from asserting that it is an organization whose membership is limited to “employees” within the meaning of the Act.

In this respect regard should be had to section 1(3)(b) of *The Labour Relations Act*.

- 1 (3) Subject to section 80, for the purpose of this Act, no person shall be deemed to be an employee,
 - (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

Even in a more restrictive sense, however, the granting to this organization of trade union status would seem to do violence to the spirit and intent of the legislation. I say this because even if the definitive sections of the constitution were restricted to employees within the meaning of the Act, and foremen and general foremen were subsequently found to be employees within the meaning of the Act (a situation which traditionally is difficult at this moment to conceive), a chaotic situation could result.

It is apparent that in the initial certification proceedings, and in subsequent collective agreements entered into concerning the bargaining rights of production or plant employees, persons classified as foremen and general foremen have been excluded on the basis of their performing duties of a managerial nature.

Indeed, traditionally, the Board has always presumed that persons exercising the duties of a foreman and those above such rank have been excluded from standard bargaining units on the basis of their exercise of managerial functions. Not only has the Board so presumed such classifications to exercise managerial functions, but plant employees themselves have considered such persons to be part of the “managerial team”.

Additionally, it is clear from previous jurisprudence of this Board that a trade union that was able to accept into membership all persons not covered by collective agreements (as this organization purports to do) would be unable to confine its membership to foreman and general foremen, but rather would be obliged to accept all employees not covered by collective agreements.

A fortiori, even if foremen and general foremen were subsequently found to be “employees” within the meaning of the Act, these supervisory personnel would be lumped together in an organization purporting to bargain collectively for them as well as plant em-

ployees, maintenance personnel, office personnel, and others. The results of this are inconceivable and would create chaos, not only in the administration of the plant, but also in the administration of the organization. The unrest and confusion which would undoubtedly result defies explanation, and indeed creates a conflict which the legislation is intended to cure.

This is not to ignore the fact that the general foremen were expressly forbidden to attend the founding meeting of this organization, a development which not only defies any sense of democracy, but also defies logic in view of the subsequent posture of this organization towards such classification. Neither were other employees present at the founding and organizational meetings, notwithstanding that such employees' destiny may subsequently be fashioned by this organization.

Section 1(1)(n) defines "trade union" as follows:

- (n) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions.

In my opinion, the very root of the finding of trade union status is that it must be an organization of "employees" within the meaning of the Act.

The respondent argued that if the constitution permits persons exercising managerial functions to be admitted into membership, it might unwittingly be a party to an offence under sections 12, 40, 56 or some other provision of *The Labour Relations Act*.

The majority in its finding rejects this argument and suggests that the mere presence of managerial personnel within union membership ranks would not necessarily destroy the union's status or nullify the collective agreement to which it is a party.

Having regard to the definition of "trade union" in the Act, I must join issue with my colleagues on their pronouncement. Nor is the position of the majority in accord with the previous jurisprudence of this Board.

In the *Kelly Funeral Homes Limited* case (1973) OLRB Rep. Feb. 87, the Board stated:

"1. This is an application for certification in which the applicant adduced evidence in an attempt to establish that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

2. The evidence established that Mr. Donald Elver was one of the prime movers in the formation of the applicant and indeed was elected as the applicant's first president. At the time the applicant was formed, Mr. Elver was, and continues to be, the Funeral Director of the College Memorial Funeral Chapel in Toronto. While there are no licensed embalmers employed at the College Memorial Funeral Chapel, there are

two other employees working under the jurisdiction of Mr. Elver who, of course, is subject to the authority of the corporation that owns the College Memorial Funeral Chapel. Mr. Elver testified that he negotiates the price of funerals with the relatives of the deceased and makes all other arrangements with respect to the funerals and generally performs the statutory functions as set out in section 21 of *The Embalmers and Funeral Directors Act* R.S.O. 1970, Chapter 144.

3. The relevant provisions of the Embalmers and Funeral Directors Act read as follows:

12.-(2) For the purposes of this Act and the regulations, every licensed funeral director shall be deemed to be a licensed embalmer.

21.-(1) Where a funeral director carries on business with the public for a person, partnership, firm or corporation, he is responsible for the supervision and management of the business, and in respect of such business he and the person, partnership, firm or corporation for whom he carries on business are responsible for due compliance with this Act and the regulations.

(2) Where two or more funeral directors carry on business with the public, each of the funeral directors is responsible for the supervision and management of the business and for due compliance with this Act and regulations.

4. Although counsel for the applicant argued that Mr. Elver's authority is limited in view of the fact that he exercises his functions subject to the authority of the president of the company which owns the business, it is clear from the provisions of section 21 of *The Embalmers and Funeral Directors Act* that Mr. Elver, as Funeral Director, "is responsible for the supervision and management of the business" and is further "responsible for due compliance with this Act and the regulations" We must find that this statutory responsibility must be characterized as a managerial function within the meaning of section 1(3)(b) of *The Labour Relations Act*. We therefore find that Donald Elver exercises managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and is not an employee for the purposes of the Act.

5. Since Mr. Elver was the prime mover in the formation of the applicant and holds the office of president of the applicant, we accordingly find that the applicant is not a trade union which the Board ought to certify in view of the prohibition contained in section 12 of *The Labour Relations Act* in light of the participation by Mr. Elver in the formation and administration of the applicant.

6. This application is therefore dismissed."

In addition, the Board has also failed to grant status to an organization where, *inter alia*, the company can inadvertently or intentionally alter the bargaining unit simply by reclassifying persons without in any way changing their duties and responsibilities. (See *Northern Electric Company* case (1968) OLRB Rep. April 33 at p. 42.)

“Collective agreement” as defined by section 1(1)(e) of *The Labour Relations Act* states:

- (e) “collective agreement” means an agreement in writing between an employer or an employers organization, on the one hand, and a trade union that, or a council of trade unions that, represents *employees* of the employer or employees of members of the employers’ organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees.

[emphasis added]

In view of the prospect of the possible heterogeneous nature of the membership of the applicant, the resultant chaos which would result in the administration both of the company and the trade union, and my support for the arguments submitted by the respondent as set out in the majority award, I would deny the organization a finding of “trade union” status and dismiss the application.

0734-75-U Ernest D’Andrea, (Complainant) v. Luigi Fanelli, (Respondent).

BEFORE: T.E. Armstrong, Q.C., Chairman, and Board Members E. Boyer and J.D. Bell.

DECISION OF THE BOARD: August 22, 1975.

1. The instant complaint under section 79 of *The Labour Relations Act* was filed on August 11, 1975. The portion of the complaint relevant to this decision reads as follows:

“On or about 30th day of July, 1975 the grievor was dealt with by Luigi Fanelli contrary to the provisions of section 79(1)(a) of *The Labour Relations Act* in that he did on his own behalf or on behalf of the respondent: The respondent did arbitrarily and vindictively notify the Lummus Company of Canada Ltd. that the complainant had been hired by the Lummus Company of Canada Ltd. contrary to the terms of the collective bargaining agreement. The respondent in addition publicly made statements that he would see that the greivor never obtained employment in Lambton County.”

2. On the date of filing, the Board appointed Mr. N.J. Harper, Labour Relations Officer, to inquire into the complaint. The Labour Relations Officer has met with the complainant and the respondent, as well as the employer affected, the Lummus Company of Canada Ltd. and has reported the results of his investigations to the Board.

3. It is unnecessary to advert to the results of the Labour Relations Officer's investigation other than to say that he has been unable to effect a settlement of the complaint. Before the Board can list a complaint for hearing it must be satisfied that allegations are made which, if supported by evidence, could result in a contravention of some provision of the Act. It will be noted that the complaint is brought against Mr. Luigi Fanelli who, at all relevant times, was the business representative and financial secretary of Operative Plasterers & Cement Masons International Association, Local 915. The complaint alleges a violation of section 79(1)(a). However, section 79 is a procedural section and does not itself create an offence. It merely provides a mechanism for obtaining redress where there has been a violation of some substantive provision of the Act: see *National Sea Products Limited* (1961) OLRB Rep. May 61 at p. 62, a copy of which is enclosed. Accordingly, on the basis of the material before us we are not prepared to list the matter for hearing. The proceedings are therefore terminated.

4. This decision is, of course, entirely without prejudice to the complainant's right to submit a fresh complaint or to request the Board to review this decision should we have misunderstood the nature of the complaint. In this connection, the attention of the parties is directed to Rule 46 of the Board's Rules of Procedure, copies of which are also enclosed.

5345-73-U Robert E. Gibb, (Complainant) V. United Brewers' Warehousing Workers' Provincial Board, representing Local and Branch Unions of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C., (Respondent) V. Brewers Warehousing Company Limited, (Intervener #1) V. United Brewers' Warehousing Workers Provincial Board representing International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (Now merged and affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America), (Intervener #2).

BEFORE: Frank V. Boscariol, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

DECISION OF BOARD MEMBERS J. D. BELL AND O. HODGES: August 25, 1975.

1. By letter dated July 4th, 1975 the complainant requested that written reasons be given for the oral decision of the Board delivered at the hearing on June 11th, 1975.

2. The majority of the Board granted the motion made by counsel for the respondent: – the complainant had not made out a *prima facie* case that the respondent trade union had violated its statutory duty of fair representations pursuant to the provisions of section 60 of The Labour Relations Act. The decision was confirmed in writing on June 17th, 1975.

3. Robert Gibb, the complainant in this matter testified that he became employed by intervener #1 in June 1971 as a temporary employee. This classification is defined in the collective agreement (Exhibit 1) paragraph 3:02 as being those employed for seasonal, casual or part time work in order to maintain as stable a regular staff as conditions will permit.

4. Mr. Gibb worked in the Amherstburg store on the basis of 40 hours per week during the summer months and 10 hours per week during the winter months while he was a full time student at the University of Windsor.

5. By August 1972, Mr. Gibb had accumulated 500 hours of work and was offered the opportunity to become a full time regular employee. However, he would have to be available for all assignments if he accepted this change of classification. He refused in order to continue his education and so he reverted to zero hours.

6. Mr. Gibb was not a member of the union nor did he at any time seek membership. However, 8 cents per hour was checked off for union dues in accordance with paragraph 2:01 of the collective agreement (Exhibit 1). He further testified that although he had never participated in union affairs, he did become aware that the collective agreement in effect at the time (Exhibit 2) was due to expire on December 31, 1973.

7. Early in November, 1973, Mr. Gibb telephoned Mr. Lou Sedran the Secretary-Treasurer of Local 278 in Windsor and enquired what was going on. Mr. Sedran advised Mr. Gibb that all the proposals had been drafted and reviewed and negotiations for the new collective agreement had already commenced. Mr. Gibb further testified that he had intended to obtain signatures on a letter he had prepared concerning temporary employees. However, after his conversation with Mr. Sedran, he dropped the matter and did not try to secure any signatures on his letter.

8. Late in January, Mr. Gibb was advised by the Store Manager at Amherstburg, that a new collective agreement had been negotiated and that membership were to vote on it. He did not know when this vote took place. He became aware of the terms of the new collective agreement through discussion with employees who come to Amherstburg from Windsor on a temporary basis. He learned that the wage increase was 37.8 per cent for full time employees vs 18.5 per cent for temporaries over a three year term. He called Mr. Sedran in February and asked him what he thought. Mr. Sedran advised him that the agreement was already signed and nothing could be done now.

9. Mr. Gibb made enquiries with various sources to see what recourse was available to him. On March 13, 1974, this complaint was filed. A further discussion was held with Mr. Gordon Plenderleigh, Chairman of the Provincial Board and Mr. Tomobello, Vice President of Local 278 who explained to him that it was the objective of the union to have more full time employees and eliminate temporaries. Also the agreement could not have been rejected by the union solely for the sake of the temporaries. These discussions were friendly and the reasoning was accepted by Mr. Gibb.

10. The applicant did not call any further evidence in support of this charge that section 60 of The Labour Relations Act had been violated. Counsel for the respondent union then moved that the complaint should be dismissed as the complainant has not presented a *prima facie* case that the respondent union had violated its statutory duty of fair representation.

11. Section 60 of The Labour Relations Act states:

“A trade union or council of trade union, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be R.S.O. 1970, c.232, s.60.”

12. There was no evidence presented that the union or its officers acted in a manner that was arbitrary, discriminatory or in bad faith. Nor was the evidence such that the respondent trade union should have been called upon to give an explanation.

13. The settlement negotiated by the parties was arrived at in the normal way. The practise of having a different wage settlement for two different groups of employees is not uncommon, and such settlement was accepted by the membership.

14. Mr. Gibb had not joined the union nor had he tried participating in the union's affairs. If he wished to make suggestions and recommendations his first step should have been to join and attend meetings. Further, when he did seek information from union officers he was, by his own evidence, treated courteously and given answers which at that time he accepted.

15. Therefore, it is the decision of the majority of the Board that Mr. Gibb was not treated in a manner which can be considered arbitrary, discriminatory or in bad faith by the respondent trade union and there was no necessity to put the respondent to its election as to whether or not it wished to adduce evidence in defence as a *prima facie* case had not been made out.

DECISION OF FRANK V. BOSCARIOL, VICE-CHAIRMAN: August 25, 1975.

1. By letter dated July 4, 1975, the complainant has requested that written reasons be given for the decision of the Board in this matter dated June 17, 1975.

2. As indicated in my dissent to the majority decision of the Board dated June 17, 1975, I would not have, in the circumstances, dismissed this complaint at the conclusion of the evidence as adduced on behalf of the complainant at the hearing of this matter on June 11, 1975. Rather, I would have directed that the respondent trade union be put to its election as to whether or not it wished to adduce evidence in defence.

3. The evidence as adduced by the complainant concerning the quality of the trade union's representation during negotiations with respect to Mr. Gibb in his capacity as a temporary employee, when viewed together with the contents of the collective agreement resulting from those negotiations, raised, in my opinion, a *prima facie* case of discrimination contrary to the provisions of section 60 of The Labour Relations Act.

0586-75-U International Ladies' Garment Workers' Union, (Complainant) v. **Petite Originals Co. Ltd.,** (Respondent).

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members J. D. Bell and H. Simon.

APPEARANCES AT THE HEARING: *Wallace Fram and Ann Bryan for the complainant; D. L. Brisbin and W. Vali for the respondent.*

DECISION OF THE BOARD: August 19, 1975.

1. This is a complaint under section 79 of *The Labour Relations Act* in which it is alleged that the grievor, Margarita Pacheco, has been dealt with by the respondent contrary to various provisions of *The Labour Relations Act*.

2. Prior to May 27, 1975, the grievor had been employed by the respondent for approximately four and a half years as a finisher engaged in cleaning, finishing, folding and packaging garments produced by the respondent in its Toronto plant. In March of 1975, her employment with the respondent was terminated, along with five other employees. Complaints were filed on behalf of all six employees under section 79 of the Act, and, in due course, all six employees were reinstated, with full compensation, by order of the Board dated May 15, 1975. (O.L.R.B. File No. 7535-74-U.) The grievor returned to work on May 22, 1975.

3. Prior to her return to work, the grievor had been planning a trip to Portugal to visit her father who was seriously ill. The evidence established that she delayed her trip until her earlier complaint was dealt with by the Board.

4. On Monday, May 26, the grievor's daughter, Maria Silva, attended the respondent's premises to request, on her mother's behalf, leave of absence for one month for the Portugal trip. There is a critical conflict in the testimony concerning Mrs. Silva's conversation with the management of the respondent on this occasion. In view of the ultimate disposition of the case, and in the expectation that the grievor will be re-employed by the respondent in the future, we do not deem it advisable to dwell upon issues of credibility. It is sufficient to observe that Mrs. Silva was of the view that, in refusing to grant her mother leave of absence, the respondent was motivated or influenced by her previous union activity. Mr. and Mrs. Vali, the respondent's owners, denied that they were so motivated. Of decisive importance, in respect to this issue, was the testimony of the respondent's bookkeeper, Theresa Rasevych, who was present during the entire conversation. Mrs. Rasevych's evidence was that Mrs. Silva's request, on behalf of her mother, was refused and that there was no reference to her union involvement or to her being a troublemaker at the plant. All witnesses agreed that Mr. Vali stated that the grievor was entitled to two weeks' vacation; that if she wanted a further period of time off she would have to leave the respondent's employ; and that he would be prepared to rehire her as a new employee upon her return, if work was available.

5. The complainant argued that, in refusing the grievor's request for leave of absence, the respondent was discriminating against her, contrary to the Act. The complainant contended that the respondent has had a consistent past practice of permitting extended leaves of absence to enable employees of European origin to visit their homelands. Accord-

ing to the complainant, employees on such leave have invariably been permitted to return to work. The respondent, on the other hand, denied that such a policy is now in existence. Mr. Vali's evidence was that, in late 1974, the respondent became concerned that employees were taking advantage of the company's policy of granting extended leaves of absence. He claimed that, in early 1975, the respondent formulated a specific policy whereby any employee requesting more than the minimum annual vacation prescribed by law would be expressly told that he or she would have to quit, and that any opportunity for re-employment would depend upon the respondent's employment needs at the time of re-application. As evidence of this new policy, reference was made to the employment records of several employees, other than the grievor, who, it was contended, had been refused extended leaves of absence and had, in fact, been required to quit their employment. In at least two of those instances, the employees' dates of departure, as shown on their Unemployment Insurance report forms, preceded the date of the grievor's departure, supporting the respondent's contention that the policy was established prior to the incident giving rise to the grievor's complaint.

6. In addition, there is no doubt that the grievor knew, as early as May 27, that her employment records showed that she had quit. The evidence disclosed that she discussed the matter with her daughter on or about that date. It is also clear that Mrs. Silva knew that her mother would not automatically be re-employed upon her return. When Mrs. Silva returned to the respondent's plant on July 3, the first working day following her mother's return from Portugal, she testified that she stated to Mrs. Vali: "Last month I asked for permission for my mother to go to Portugal. She has come back and I wonder if she can come to work." Mrs. Vali referred the request to her husband, who, according to Mrs. Silva's own evidence, said that he was sorry that he did not have a job for her mother at that time. He added that the grievor was a good worker but that there was no work on her previous job owing to a lack of business.

7. The respondent's evidence is that, in 1974, the respondent employed between seventy and seventy-five persons but that, by 1975, the number had dropped to between fifty and fifty-five. Additionally, at the time that the grievor left for Portugal, there were four finishers, and at the time of the hearing, there was only one. While two sewing machine operators have been hired since the respondent's refusal to re-employ the grievor, the complainant does not contend that the grievor is qualified as a sewing machine operator.

8. Having carefully weighed the evidence and considered counsels' submissions, we have concluded that the complaint must be rejected. In so holding, we have relied heavily on the testimony of Theresa Rasevych, the one witness who appears to have no stake in the outcome of the proceedings, who was present during the critical conversation of May 26, when Mrs. Silva sought permission for leave of absence for the grievor. Accepting, as we do, Mrs. Rasevych's evidence, we are satisfied, on the balance of probabilities, that the respondent has not dealt with the grievor contrary to any provision of *The Labour Relations Act*.

9. In reaching our decision, we have also relied on the assurances given by Mr. Vali during the course of the hearing that the grievor is a good worker and that he is prepared to re-employ her when work becomes available. We accept that this undertaking was made in good faith. At the present time, the respondent has only one finisher. It seems not unlikely that more finishers will be required in the not too distant future. The grievor ought to be given the first opportunity for such work. As we have pointed out, she has served the res-

pendent for over four and a half years, without interruption, even for vacations. Manifestly, it would be in the respondent's interest to regain the services of such a dedicated employee as soon as the need arises. We refrain from any further comment on the matter, not wishing to jeopardize what appears to us to be the likelihood of the resumption of an amicable employment relationship. In particular, no useful purpose is served by speculating as to the effect of the respondent's failure to carry out its expressed intention to re-employ Mrs. Pacheco at the earliest opportunity when work within her competence becomes available. We are confident that that undertaking will be fulfilled.

0696-75-R United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. **Hammond Manufacturing Company Limited**, (Respondent) v. Hammond Employees Association Committee, (Intervener).

BEFORE: Frank V. Boscarior, Vice-Chairman, and Board Members J.D. Bell and E. Boyer.

DECISION OF THE BOARD: August 25, 1975.

2. The applicant has requested that a pre-hearing representation vote be taken.

3. Having carefully considered the representations of the respondent and the intervener as contained in their letters filed with the Board and dated August 13th and August 19th, 1975, respectively, the Board, in the exercise of its discretion pursuant to the provisions of section 8(2) of The Labour Relations Act, denies the request to dismiss this application on the basis that the applicant has not submitted evidence of membership of at least forty-five per cent of the employees in the voting constituency as defined below. Accordingly, it appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the applicant was made.

4. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the company at its facilities located in the city of Guelph and its distribution centre in the township of Puslinch save and except foremen, persons above the rank of foreman, office, clerical, sales and technical personnel, those engaged in design, research and laboratory work, students employed during the school vacation period, security guards, stationary engineers, persons engaged in a confidential capacity in matters relating to Labour Relations and persons regularly employed for not more than twenty-four hours per week.

5. All employees of the respondent in the voting constituency on the 11th day of August, 1975, who have not voluntarily terminated their employment or who have not been discharged for cause between the 11th day of August, 1975, and the date the vote is taken will be eligible to vote.

6. Voters will be given a choice between the applicant and the intervener.

7. The matter is referred to the Registrar.

0642-75-U Mutuel Employees' Association, Local 528, Service Employees International Union, (Complainant) v. **Flamboro Downs Holdings Limited**, (Respondent).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES AT THE HEARING: *Ian Springate, Howard Levitt and Roy Boskett appearing for the complainant; R. A. Werry and W. Howarth appearing for the respondent.*

DECISION OF THE BOARD: August 22, 1975.

2. The complainant has complained that Emilia Nardi has been dealt with by the respondent contrary to the provisions of sections 56, 58(a) and 61 of The Labour Relations Act.

3. Emilia Nardi was discharged from her position as a seller of pari-mutuel tickets with the respondent on July 16, 1975. The respondent denied that she was discharged contrary to the provisions of The Labour Relations Act and adopted the position that she was discharged because of cash shortages.

4. Mr. George Holland testified as a witness for the respondent. He gave evidence that he is employed by the respondent as a direction of mutuels and that every employee is responsible for his or her cash shortages. The respondent commenced operations on April 9, 1975, and Miss Nardi was an employee of the respondent from the commencement of its operations until July 16, 1975. The witness testified that Miss Nardi had cash shortages from April 9, 1975, until the day she left and that cash shortages are very common among its employees. Her cash shortages amounted to \$140.00. Mr. Holland gave evidence that he did not review her file at the time she was discharged and that Miss Nardi never indicated she wanted to terminate her employment because of her cash shortages. In addition, he informed the Board that he neither discussed cash shortages with Miss Nardi nor warned her about such shortages. The respondent's employees are required to reimburse the respondent in the amount of their cash shortages. The respondent did not claim that Miss Nardi had failed to pay for her cash shortages.

5. The witness referred to some thirteen other employees who had been terminated for cash shortages. However, he then varied his evidence by stating that only six had been

discharged by the respondent for cash shortages. Mr. Holland, in cross-examination, reviewed Miss Nardi's cash shortages for the last six working days before she was discharged and declared that she did not have any cash shortages for any of the days during a six day period which commenced on June 25, 1975.

6. In further cross-examination, the witness agreed that he found out about the complainant's organizational drive two days before Miss Nardi was discharged. Mr. Holland was closely questioned about why he discharged Miss Nardi on July 16, 1975, and conceded that he had discharged Miss Nardi on the instructions of the respondent's vice-president and general manager Charles Juravinski. The witness was also cross-examined on the respondent's treatment of a former employee named Rick Dumala. Mr. Holland informed the Board that he asked Mr. Dumala if he held a union card and that when Mr. Dumala stated that he did the witness informed him that he was not needed for work on the day in question. Subsequently, Mr. Dumala went to Mr. Holland's office where he received a "good talking to" about the complainant and was then subsequently permitted to return to work for the respondent. The witness also gave evidence in cross-examination about Mr. Juravinski's unfavourable reaction when the latter addressed the employees about the time, place and date of a scheduled meeting between the complainant and the employees.

7. The respondent's defence to this complaint is that Miss Nardi was discharged because of cash shortages. The respondent appears not to have any ascertainable criteria with respect to its treatment of employees who are responsible for cash shortages. Miss Nardi was not warned about her cash shortages. The defence of the respondent does not stand up under scrutiny. She was purportedly discharged for cash shortages. However, if this was the reason, it seems strange that Mr. Holland did not review her history of cash shortages prior to the dismissal. It is also inconsistent with her most recent performance in her job. In addition, Mr. Holland gave evidence that Mr. Juravinski told him to discharge Miss Nardi. The Board is of the view that Miss Nardi was not discharged for her cash shortages and that she was discharged on the direction of Mr. Juravinski. Why was she discharged? The complainant contends that she was discharged because of her efforts to organize the respondent's staff.

8. The defence is, in our opinion, merely an attempt to conceal the real reason for Miss Nardi's discharge. The reason for her discharge is to be discovered by looking at the events surrounding her discharge. There is Mr. Juravinski's reaction to the scheduled meeting between the complainant and the employees. Of even greater significance is the treatment of Mr. Dumala by the respondent. The conduct of the respondent as executed by Mr. Juravinski and Mr. Holland permits the Board to conclude that the respondent entertained a strongly unfavourable attitude towards the complainant and the option of its employees in determining whether or not they (not the respondent) wished to establish contact with and become members of the complainant.

9. The burden of proof that the respondent did not act contrary to The Labour Relations Act lies upon the respondent by virtue of section 79 (4a) of the Act. The respondent has not satisfied this burden of proof and the Board finds that Emilia Nardi has been dealt with by the respondent contrary to the provisions of sections 56, 58(a) and 61 of The Labour Relations Act.

Unit: "all employees of the respondent, save and except road superintendent, persons above the rank of road superintendent, office and clerical staff." (2 employees in the unit).

0587-75-R: Marble Masons Tile Layers and Terrazzo Workers' Union No. 31 (Applicant) v. Speedway Plastering & Stucco Ltd. (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0599-75-R: Local 893 of the Hotel, Motel, Restaurant Employees' of the Hotel & Restaurant & Bartenders' Int. Union (Applicant) v. Bar-Rene Restaurant (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Atikokan, save and except manager and persons above the rank of manager." (14 employees in the unit).

0627-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Code 1 Investments Inc. (Respondent).

Unit: "all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0628-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Code 1 Investments Inc. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

0634-75-R: Canadian Union of Public Employees (Applicant) v. The Salvation Army House of Concord (Respondent).

Unit: "all employees of the respondent at Concord, save and except Administrator, Assistant Administrator, Business Administrator, Chaplain, Dentist, Medical Doctor, Course Coordinator, Counselling Service Coordinator, Chief Night Supervisor, a secretary each to the Administrator, Assistant Administrator and Business Administrator, Assessment Officers, Assistant Accountant and Housekeeper." (37 employees in the unit). (*Having regard to the agreement of the parties*).

0636-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Hayes-Dana Parts Co. Ltd. (Respondent).

Unit: "all employees of the respondent at Thorold, save and except foremen, persons above the rank of foreman, office and sales staff and those employees currently represented by International Union,

United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) Local 374 (office employees) and Local 676 (plant employees) subsisting collective agreement effective June 1, 1974 through May 31, 1977.” (4 employees in the unit).

0638-75-R: Christian Labour Association of Canada (Applicant) v. Standard Pressure Pipe Company (Division of Standard Industries Ltd.) (Respondent).

Unit: “all employees working at or out of the respondent’s premises located in Whitechurch Township save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards and students employed during the school vacation period.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

0644-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lakeview Builders Supplies Limited (Respondent).

Unit: “all employees of the respondent at North Bay, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period.” (6 employees in the unit).

0647-75-R: International Brotherhood of Painters and Allied Trades Glaziers – Local 1819 (Applicant) v. C T Windows Limited (Respondent).

Unit: “all window installers and window installers’ helpers employed by the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in primary installations of factory fabricated windows and sash, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0648-75-R: Ontario Nurses’ Association (Applicant) v. Sunbeam Home (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kitchener, save and except the Nursing Supervisor, persons above the rank of the nursing supervisor, and persons regularly employed for not more than 24 hours per week.” (5 employees in the unit).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kitchener for not more than 24 hours per week, save and except the nursing supervisor and persons above the rank of nursing supervisor.” (4 employees in the unit).

0649-75-R: Ontario Nurses’ Association (Applicant) v. Sunnybrook Hospital (Respondent).

Unit: “all registered and graduate nurses regularly employed by the respondent in the Municipality of Metropolitan Toronto, engaged in nursing care for not more than 24 hours per week, save and except head nurses, persons above the rank of head nurse, and persons classified as in-service instructors and nurse clinicians.” (43 employees in the unit). (*Having regard to the agreement of the parties*).

0650-75-R: Ontario Nurses’ Association (Applicant) v. Corporation of the County of Essex (Respondent).

Unit: “all registered and graduate nurses employed by the respondent in a nursing capacity at the Sun Parlor Home for Senior Citizens in Leamington save and except the Director of Nursing and persons above the rank of Director of Nursing.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1975

Applications for Certification

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

0037-75-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Wicksteed (Respondent).

Unit: "all employees of the respondent, save and except foremen, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in the unit).

0068-75-R: Canadian Union of Public Employees (Applicant) v. The Provisional County of Haliburton (Respondent).

Unit: "all office, clerical and technical employees of the respondent, save and except clerk-treasurer and county engineer, and persons above the rank of clerk-treasurer and county engineer, and persons regularly employed for not more than 24 hours per week." (10 employees in the unit).

0176-75-R: Hamilton and District Sheet Metal Contractors Inc. (Applicant) v. Sheet Metal Workers' International Association Local Union 537 Hamilton Ontario Branch (Respondent).

Unit: "all employers of employees for whom the respondent has bargaining rights in the Town of Burlington, the Township of Nassagaweya, the Town of Milton, that part of the Town of Oakville being south of the Town of Milton and west of Provincial Highway No. 25 to a point where the Oakville Creek crosses Highway 25 and that part of the Town of Oakville lying west of the Oakville Creek between Highway 25 and Lake Ontario all in the County of Halton; the City of Hamilton, the County of Wentworth, the Townships of Seneca, Oneida, Walpole, Rainham, North Cayuga, that part of the Township of South Cayuga lying west of County Road 36 and that part of the Township of Canborough lying west of County Road 15 all in the County of Haldimand and that part of the Township of West Lincoln lying between the easterly boundary of the County of Wentworth and Regional Road 16 as it extends from its intersection with Regional Road 63 to the Town of Smithville and Regional Road 14 as it extends from Smithville to the Shares of Lake Ontario, in the Electrical Powers Systems sector." (no employees in the unit). (*Having regard to the agreement of the parties*).

0288-75-R: Ontario Nurses' Association (Applicant) v. The Cottage Hospital, Uxbridge (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent in a nursing capacity at The Cottage Hospital in Uxbridge, save and except head nurses, persons above the rank of head nurse, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

(Bargaining Unit #2 – see Application Certified Subsequent to Post-hearing Vote).

0301-75-R: Ontario Nurses' Association (Applicant) v. St. Joseph's General Hospital (Respondent).

Unit #1: "all lay registered and graduate nurses employed by the respondent at Elliott Lake engaged in a nursing capacity save and except head nurses, persons above the rank of head nurse and persons who are regularly employed for not more than 24 hours per week." (36 employees in the unit).

(Bargaining Unit #2 – see Application Certified Subsequent to Post-hearing Vote).

0314-75-R: Ontario Nurses' Association (Applicant) v. Extencicare Ltd. (Respondent).

Unit #1: "all registered and graduate nurses employed by the respondent at the Extencicare Nursing Home in Sudbury engaged in a nursing capacity, save and except the nursing supervisor, persons above the rank of nursing supervisor and persons regularly employed for not more than 24 hours per week." (8 employees in the unit).

(Bargaining Unit #2 – see Application Certified Subsequent to Post-hearing Vote).

0377-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. New Glen Investments (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at New Glen Apartment, 25 Strong Court, Downsview, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (3 employees in the unit).

0431-75-R: Retail Clerks Union, Local 486 (Applicant) v. Tip Top Meat Market Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the company at Ottawa, Ontario save and except Assistant Store Managers, Store Managers and persons above the rank of Store Manager." (15 employees in the unit). *(Having regard to the agreement of the parties).*

0495-75-R: Ontario Nurses' Association (Applicant) v. The Corporation of The County of Middlesex (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at Strathmere Lodge, save and except Director of Nursing and graduate nurses who are covered by a collective agreement effective November 18, 1974, between the respondent and Service Employees International Union, Local 200." (11 employees in the unit). *(Having regard to the agreement of the parties). (For the purpose of clarity the board declared that the Admitting Officer and the Assistant Director of Nursing are included in the bargaining unit.).*

0539-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Wix Corporation Limited (Respondent).

Unit: "all employees of the respondent in Pickering, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (43 employees in the unit).

0581-75-R: United Steelworkers of America (Applicant) v. Corporation of the Township of Hagar (Respondent).

Unit: "all employees of the respondent, save and except road superintendent, persons above the rank of road superintendent, office and clerical staff." (2 employees in the unit).

0587-75-R: Marble Masons Tile Layers and Terrazzo Workers' Union No. 31 (Applicant) v. Speed-way Plastering & Stucco Ltd. (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit). (*Having regard to the agreement of the parties*).

0599-75-R: Local 893 of the Hotel, Motel, Restaurant Employees' of the Hotel & Restaurant & Bartenders' Int. Union (Applicant) v. Bar-Rene Restaurant (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Atikokan, save and except manager and persons above the rank of manager." (14 employees in the unit).

0627-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Code 1 Investments Inc. (Respondent).

Unit: "all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope) engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0628-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Code 1 Investments Inc. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

0634-75-R: Canadian Union of Public Employees (Applicant) v. The Salvation Army House of Concord (Respondent).

Unit: "all employees of the respondent at Concord, save and except Administrator, Assistant Administrator, Business Administrator, Chaplain, Dentist, Medical Doctor, Course Coordinator, Counselling Service Coordinator, Chief Night Supervisor, a secretary each to the Administrator, Assistant Administrator and Business Administrator, Assessment Officers, Assistant Accountant and House-keeper." (37 employees in the unit). (*Having regard to the agreement of the parties*).

0636-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Hayes-Dana Parts Co. Ltd. (Respondent).

Unit: "all employees of the respondent at Thorold, save and except foremen, persons above the rank of foreman, office and sales staff and those employees currently represented by International Union,

United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) Local 374 (office employees) and Local 676 (plant employees) subsisting collective agreement effective June 1, 1974 through May 31, 1977.” (4 employees in the unit).

0638-75-R: Christian Labour Association of Canada (Applicant) v. Standard Pressure Pipe Company (Division of Standard Industries Ltd.) (Respondent).

Unit: “all employees working at or out of the respondent’s premises located in Whitchurch Township save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards and students employed during the school vacation period.” (4 employees in the unit). (*Having regard to the agreement of the parties*).

0644-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lakeview Builders Supplies Limited (Respondent).

Unit: “all employees of the respondent at North Bay, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period.” (6 employees in the unit).

0647-75-R: International Brotherhood of Painters and Allied Trades Glaziers – Local 1819 (Applicant) v. C T Windows Limited (Respondent).

Unit: “all window installers and window installers’ helpers employed by the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in primary installations of factory fabricated windows and sash, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the agreement of the parties*).

0648-75-R: Ontario Nurses’ Association (Applicant) v. Sunbeam Home (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kitchener, save and except the Nursing Supervisor, persons above the rank of the nursing supervisor, and persons regularly employed for not more than 24 hours per week.” (5 employees in the unit).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kitchener for not more than 24 hours per week, save and except the nursing supervisor and persons above the rank of nursing supervisor.” (4 employees in the unit).

0649-75-R: Ontario Nurses’ Association (Applicant) v. Sunnybrook Hospital (Respondent).

Unit: “all registered and graduate nurses regularly employed by the respondent in the Municipality of Metropolitan Toronto, engaged in nursing care for not more than 24 hours per week, save and except head nurses, persons above the rank of head nurse, and persons classified as in-service instructors and nurse clinicians.” (43 employees in the unit). (*Having regard to the agreement of the parties*).

0650-75-R: Ontario Nurses’ Association (Applicant) v. Corporation of the County of Essex (Respondent).

Unit: “all registered and graduate nurses employed by the respondent in a nursing capacity at the Sun Parlor Home for Senior Citizens in Leamington save and except the Director of Nursing and persons above the rank of Director of Nursing.” (14 employees in the unit). (*Having regard to the agreement of the parties*).

0655-75-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. W. Benson Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

0656-75-R: International Brotherhood of Painters and Allied Trades Local 200 (Applicant) v. Sal Piamonte & Sons Painting Contractors Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

0659-75-R: Canadian Union of Public Employees (Applicant) v. Lindsay Public Library (Respondent).

Unit #1: "all employees of the respondent at Lindsay, save and except the Chief Librarian, persons above the rank of Chief Librarian, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit).

Unit #2: "all employees at Lindsay who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Chief Librarian and persons above the rank of Chief Librarian." (7 employees in the unit).

0661-75-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. The Borden Company Limited (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*). (*For purposes of clarity the board noted that "sales staff" does not include driver salesmen included in the appropriate unit.*).

0667-75-R: Canadian Marine Officers Union (Applicant) v. The Owen Sound Transportation Company Limited (Respondent).

Unit: "all employees of the respondent who are employed as Licensed Engineers on board the vessel M.S. Chi-Cheemaun of Owen Sound, save and except the Chief Engineer and persons above the rank of Chief Engineer." (4 employees in the unit).

0677-75-R: International Beverage Dispensers' and Bartenders' Local 280, of the Hotel and Restaurant Employees' Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Forge (Respondent).

Unit: "all full-time and part-time tapmen, bartenders, beverage waiters, bar-boys and improvers in the employ of the respondent at The Forge Tavern in Toronto, save and except the Manager and persons above the rank of Manager." (16 employees in the unit).

0680-75-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 1940 and 2041 (Applicant) v. Essex Drywall, Plastering & Acoustics Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton in the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*For the purpose of clarity, the board declared that drywall tapers are not included in the bargaining unit.*)

0682-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. J. Andrychuk Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0683-75-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233 (Applicant) v. Log Tec Incorporated (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquering and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit).

0684-75-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Listowel Memorial Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Listowel, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (111 employees in the unit). (*Having regard to the agreement of the parties, the board declared that the term technical personnel comprises Physiotherapists, Occupational Therapists, Psychologists, Electro-Encephalographers, Electrical Shock Therapists, Laboratory, Radiological, Pathological and Cardiological Technicians.*)

0686-75-R: International Leather Goods, Plastic and Novelty Workers Union, Local 8 (Applicant) v. Celebrity Hand Bags Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (6 employees in the unit).

0690-75-R: International Chemical Workers Union (Applicant) v. Block Drug Company (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (51 employees in the unit).

0691-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Palace Pier Condominiums (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0703-75-R: Labourers' International Union of North America Local 491 (Applicant) v. Kuzmas Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0711-75-R: Office and Professional Employees International Union, Local No. 343, AFL-CIO-CLC (Applicant) v. United Brotherhood of Carpenters & Joiners of America, Local No. 494, AFL-CIO-CLC (Respondent).

Unit: "all office employees of the respondent in Windsor save and except supervisors and persons above the rank of supervisor." (2 employees in the unit).

0712-75-R:

Oil & Technicians, Service, Domestic and General Workers Union, Local 1267 (Applicant) v. Neo Industries Limited (Respondent).

Unit: "all employees of the respondent working at or out of its factory at the Town of Stoney Creek, save and except foremen, persons above the rank of foreman, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0719-75-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Rose City Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0720-75-R: United Brotherhood of Carpenters and Joiners of America, Local 18, Hamilton, Ontario (Applicant) v. Standard Industries Ltd. (Building Division) (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0727-75-R: United Brotherhood of Carpenters & Joiners of America Local Union 1669 (Applicant) v. Alpine Building Contractors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent is the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0739-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dibco Underground Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0747-75-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Bot Construction (Canada) Limited (Respondent).

Unit: "all truck drivers in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and person above the rank of non-working foreman." (6 employees in the unit).

0751-75-R: Christian Labour Association of Canada (Applicant) v. Lakeview Sheet Metal (Orillia) Limited (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0754-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Korsan Limited (Respondent).

Unit: "all employees of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott and all lands south thereof in the United Counties of Leeds and Grenville, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0755-75-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. E & E Seegmiller Limited (Respondent).

Unit: "all truck drivers in the employ of the respondent in the Counties of Brant and Norfolk, save and except foremen, dispatchers and those above the rank of foreman and dispatchers." (3 employees in the unit).

0760-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Greenfield Construction Co. Incorporated (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0765-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Armbrø Materials & Construction Limited (Respondent).

Unit: "all employees of the respondent within a fifty mile radius of the Timmins Federal Building engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (10 employees in the unit).

0766-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent).

Unit: "all employees of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0770-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Main Forming and Construction Limited (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (19 employees in the unit).

0771-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bramalea General Contracting (Peel Ltd) (Respondent).

Unit: "all employees of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Application Certified Subsequent to Pre-Hearing Vote

7555-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Belmont Plastering Co. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

Number of persons who cast ballots	17
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of Intervener #1	7

0370-75-R: Service Employees' Union, Local 210. Affiliated with Service Employees' International Union. AFL-CIO-CLC (Applicant) v. The Board of Trustees of the Roman Catholic Separate Schools of the City of Windsor (Respondent).

Unit: "all employees of the Respondent employed as secretaries to the various school principals of the Respondent save and except persons regularly employed for not more than ten (10) hours per week and employees covered by existing collective agreements." (48 employees in the unit).

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	23

0591-75-R: The Civil Service Association of Ontario, Inc. (Applicant) v. The Children's Aid Society of Ottawa La Societe De L'Aide A L'Enfance D'Ottawa (Respondent).

Unit: "all employees of the respondent employed in the Regional Municipality of OttawaCarleton save and except supervisors, persons above the rank of supervisor, persons employed for not more than twenty four hours per week and students employed during the school vacation period, office and clerical staff, operational employees and nurses employed in a nursing capacity." (152 employees in the unit). *(For purposes of clarity the board noted the agreement of the parties to the effect; 1) operational employees in the above description refers to caretakers, maintenance and housekeeping staff meaning persons not primarily engaged in a social work or child care capacity. 2) to exclude from the bargaining unit all persons classified as "co-ordinators" as they are employed in a managerial capacity, within the meaning of section 1(3) (B) of The Labour Relations Act.).*

Number of names of persons on revised voters' list	144
Number of persons who cast ballots	73
Number of ballots marked in favour of applicant	65
Number of ballots marked against applicant	8

Applications Certified Subsequent to Post-Hearing Vote

0288-75-R: Ontario Nurses' Association (Applicant) v. The Cottage Hospital, Uxbridge (Respondent).

Unit #2: "all registered and graduate nurses engaged in a nursing capacity at The Cottage Hospital in Uxbridge who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except head nurses and persons above the rank of head nurse." (4 employees in the unit).

Number of names of persons on voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

(Bargaining Unit #1 – see Bargaining Units Certified No Vote Conducted).

0301-75-R: Ontario Nurses' Association (Applicant) v. St. Joseph's General Hospital (Respondent).

Unit #2: "all lay registered and graduate nurses in the employ of the respondent at Elliott Lake engaged in a nursing capacity and who are regularly employed for not more than 24 hours per week save and except the head nurse and persons above the rank of head nurse." (2 employees in the unit).

Number of names of persons on voters list		3
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	0	

(Bargaining Unit #1 – see Bargaining Units Certified No Vote Conducted).

0314-75-R: Ontario Nurses' Association (Applicant) v. Extendicare Ltd. (Respondent).

Unit #2: "all registered and graduate nurses employed by the respondent at the Extendicare Nursing Home in Sudbury engaged in a nursing capacity and who are regularly employed for not more than 24 hours per week, save and except nursing supervisor and persons above the rank of nursing supervisor." (6 employees in the unit).

Number of names of persons on voters' list		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	0	

(Bargaining Unit #1 – see Bargaining Units Certified No Vote Conducted.)

0362-75-R: Canadian Union of Operating Engineers (Applicant) v. Westinghouse Canada Limited (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent at its Consumer Service Depot in the City of St. Catharines, Ontario save and except service managers and persons above the rank of service manager, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative training programme." (7 employees in the unit).

Number of names of persons on voters list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	3	

0436-75-R: International Union of Operating Engineers, Local 796 (Applicant) v. Olympia and York Developments Ltd. (Respondent).

Unit: "all mechanical maintenance employees in the employ of Olympia & York Developments Ltd. at 1 First Canadian Place, Toronto, engaged in maintenance and operating services, save and except Assistant Superintendent, persons above the rank of Assistant Superintendent, office staff, persons regularly employed for not more than 24 hours per week and students hired for the school vacation period." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	2	

0460-75-R: International Molders & Allied Workers Union (Applicant) v. S. A. Armstrong Limited (Respondent) v. United Steelworkers of America (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the Respondent at the City of Belleville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, production control clerks and methods and standards personnel." (43 employees in the unit).

Number of names of persons on revised voters' list		40
Number of persons who cast ballots	35	
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	22	
Number of ballots marked in favour of no trade union	10	

0473-75-R: Labourers International Union of North America, Local #493 (Applicant) v. Law Construction Ltd. (Respondent).

Unit: "all construction labourers employed by the respondent while working within the Townships of Springer, Caldwell, Badgerow, Field, Grant and Pedley excepting therefrom those portions of Townships of Grant and Pedley which are included in the area encompassed by a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in the unit).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	7	

0481-75-R: London and District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Corporation of the County of Middlesex (Respondent).

Unit: "all office and clerical employees of the respondent at Strathroy, Ontario, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week." (11 employees in the unit).

Number of names of persons on voters list		5
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	1	

0557-75-R: Local 1687 International Brotherhood of Electrical Workers (Applicant) v. Noront Construction and Maintenance (Respondent) v. Group of Employees (Objectors).

Unit: "all electricians, electricians' apprentices and electrical helpers in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (36 employees in the unit).

Number of names of persons on revised voters' list		36
Number of persons who cast ballots	36	
Number of ballots marked in favour of applicant	19	
Number of ballots marked against applicant	17	

APPLICATIONS FOR CERTIFICATION DISMISSED DURING AUGUST

No Vote Conducted

7498-74-R: Retail Clerks International Association (Applicant) v. Competition Motors (London) Limited (Respondent) v. Group of Employees (Objectors). (2 employees).

0077-75-R: The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736 (Applicant) v. Hilderbrandt Ironworks Limited (Respondent). (7 employees).

0135-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwall Forming Limited, Cedar Forming Limited, and Luna Construction & Forming Ltd. (Respondents). (no employees).

0136-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwall Forming Limited, Cedar Forming Limited, and Luna Construction & Forming Ltd. (Respondents).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0293-75-R: United Glass & Ceramic Workers of North America, AFL-CIO, CLC (Applicant) v. W. & H. Voortman Limited (Respondent) v. Christian Trade Unions of Canada (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Burlington, save and except salesmen and office staff, non-working foreman, and truck drivers." (102 employees in the unit). (*Having regard to the agreement of the parties*).

0390-75-R: International Brotherhood of Painters and Allied Trades Local 200 – Ottawa (Applicant) v. Claude Decor (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Intervener). (2 employees).

0408-75-R: Sheet Metal Workers' International Association Local Union 537 (Applicant) v. Janzen Plumbing and Heating Ltd. (Respondent). (8 employees).

0463-75-R: United Steelworkers of America (Applicant) v. Brampton Aluminum Products Limited (Respondent) v. Group of Employees (Objectors). (41 employees).

0588-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Lake Of The Woods Electric (Kenora) Ltd. (Respondent). (2 employees).

0589-75-R: Sheet Metal Workers' International Association Local Union 537 (Applicant) v. Spinton Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton engaged in roofing, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit). *Having regard to the representations before it).*

0662-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Imperial Molasses, Division of Grandma Food Products Ltd. (Respondent) v. Employees (Objectors). (7 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0202-75-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Hotel and Club Workers Division, Local 351 (Applicant) v. Prince Hotel (Toronto) Ltd. (Respondent).

Voting Constituency: "All employees of the respondent at Toronto, save and except office staff, cashiers, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (340 employees). *(For purposes of clarity, the board noted further agreement of the parties to the effect that: (a) "Office Staff" include front desk clerk, reservations clerk, night auditors, time keepers, secretaries, clerks and all accounting personnel. (b) "Supervisors" include maitre "D" assistant maitre "D", bell captain, brandy tree mgr., coffee garden mgr., chief engineer, assistant engineer, executive housekeeper, assistant housekeeper, chefs, sous chefs and chief switchboard operator.)*

Number of names of persons on revised voters' list	286
Number of persons who cast ballots	180
Ballots segregated and not counted	3
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	107

0585-75-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Delhi (Respondent).

Voting Constituency: "All office, clerical, and technical employees of the respondent in the Township of Delhi save and except the clerk, the secretary to the clerk, the treasurer, the superintendent of public works, the arena manager, the recreation director, persons employed for not more than twenty-four hours per week, students employed for the regular school vacation period, and persons covered by the subsisting collective agreement." (13 employees).

Number of names of persons on voters' list	9
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5

APPLICATIONS FOR CERTIFICATION WITHDRAWN DURING AUGUST

0335-75-R: Canadian Independent Automotive Union (Applicant) v. Chrysler Canada Ltd. (Respondent) v. Ontario Nurses' Association (Intervener). (523 employees).

0444-75-R: Wood, Wire & Metal Lathers, International Union Local 562 (Applicant) v. Volens Contractors Ltd. (Respondent) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions and District Councils in the Province of Ontario (Intervener) v. Group of Employees (Objectors). (8 employees).

0618-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Kunzelman Limited (Respondent). (4 employees).

0635-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hoffman Concrete Products Canada Limited (Respondent). (14 employees).

0646-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Orton Drive Service Ltd. (Respondent). (40 employees).

0675-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Picard Construction Associates Limited (Respondent). (6 employees).

0681-75-R: United Steelworkers of America (Applicant) v. Liquid Carbonic Canada Ltd./Ltee. (Respondent). (7 employees).

0726-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction Ltd. (Respondent). (3 employees).

0732-75-R: International Association of Bridge Structural and Ornamental Iron Workers Local 765 (Applicant) v. Raymond Structural Steel (Respondent). (3 employees).

0743-75-R: Retail Clerks International Association (Applicant) v. L. Leone Pharmacy Limited (Respondent). (7 employees).

0776-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fantin Bros. Carpenters (Respondent). (7 employees).

0777-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Limerick Carp. (Respondent). (3 employees).

Applications for Declaration Terminating Bargaining Rights Disposed of During August

0608-75-R: Neil Booth (Applicant) v. Soft Drink Workers Joint Local Executive Board, Local 385 (Respondent) v. MacDonald's Beverages (Intervener). (6 employees). (*Dismissed*).

0693-75-R: Garnett Munro and Harold Macartney (Applicants) v. The Canadian Brotherhood of Railway Transport and General Workers (Respondent). (125 employees).

Applications for Declaration of Successor Status Disposed of During August

0654-75-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Rockwell International of Canada Limited (Respondent) v. Rockwell Employees' Association (Predecessor Trade Union). (*Granted*).

0718-75-R: Ontario Nurses' Association (Applicant) v. The York Regional Board of Health (Respondent). (*Granted*).

Applications for Declaration That Strike Unlawful Disposed of During August

0488-75-U: The Corporation of the City of Timmins (Applicant) v. The Canadian Union of Public Employees Local 210 (Respondent). (*Withdrawn*).

0489-75-U: The Corporation of the City of Timmins (Applicant) v. The Canadian Union of Public Employees, Local 1544 (Respondent). (*Withdrawn*).

0490-75-U: The Corporation of the City of Timmins (Applicant) v. (See Attached Schedule "A") (Respondents). (*Withdrawn*).

Applications for Consent to Prosecute Disposed of During August

0643-75-U: Mutuel Employees' Association, Local 528, Service Employees International Union (Applicant) v. Flamboro Downs Holdings Limited (Respondent). (*Granted*).

0658-75-U: General Contractors' Section of the Toronto Construction Association (Applicant) v. Carpenters District Council of Toronto and Vicinity and Disney Display (Respondents). (*Withdrawn*).

0678-75-U: Canadian Union of Public Employees (Applicant) v. House of Concord (Respondent). (*Withdrawn*).

0744-75-U: International Leather Goods, Plastic and Novelty Workers Union, Local 8 (Applicant) v. Celebrity Hand Bags Limited (Respondent). (*Withdrawn*).

Complaints Under Section 79 (Unfair Labour Practice) Disposed of During August

7535-74-U: International Ladies' Garment Workers' Union (Complainant) v. Petite Originals Co. Ltd. (Respondent). (*Direction*).

0027-75-U: Oil, Chemical & Atomic Workers International Union Local 9-599 (Complainant) v. Murphy Oil Company Limited (Respondent). (*Dismissed*).

0201-75-U: International Ladies' Garment Workers' Union (Complainant) v. Fashion Prints (Canada) Division of Vendome Textile Industries Inc. (Respondent). (*Dismissed*).

0224-75-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Teal Manufacturing Ltd. (Respondent). (*Granted*).

0352-75-U: Carlos Mandata Samuels (Complainant) v. Retail, Wholesale Bakery and Confectionery Workers Union Local 461 of the Retail, Wholesale and Department Store Union (A.F.L.-C.I.O.-C.L.C.) (Respondent) v. Rowntree MacKintosh Canada Ltd. (Intervener). (*Dismissed*).

0478-75-U: United Steelworkers of America (Complainant) v. Kendall Company (Canada) Limited (Respondent). (*Withdrawn*).

0499-75-U: Clifford Handsor (Complainant) v. U.A.W. Local 200 and Ford Motor Co. of Canada Ltd. (Respondent). (*Withdrawn*).

0586-75-U: International Ladies' Garment Workers' Union (Complainant) v. Petite Originals Co. Ltd. (Respondent). (*Dismissed*).

0625-75-U: Warehousemen and Miscellaneous Drivers' Local Union 419 (Complainant) v. McGraw-Hill Ryerson Limited (Respondent). (*Withdrawn*).

0630-75-U: Ontario Nurses' Association (Complainant) v. Temiskaming Hospitals – Haileybury Unit (Respondent). (*Withdrawn*).

0642-75-U: Mutuel Employees' Association, Local 528, Service Employees International Union (Complainant) v. Flamboro Downs Holdings Limited (Respondent). (*Granted*).

0679-75-U: Canadian Union of Public Employees (Complainant) v. House of Concord (Respondent). (*Withdrawn*).

0688-75-U: Union of Canadian Retail Employees, C.L.C. (Complainant) v. Tip Top Meat Market Limited (Respondent). (*Withdrawn*).

0694-75-U: Mr. Andy Goldstein (Complainant) v. Star Bedding Products Limited (Respondent). (*Dismissed*).

0695-75-U: Mr. Andy Goldstein (Complainant) v. Upholsterers' International Union of North America, Local 400 (Respondent). (*Dismissed*).

0700-75-U: Mr. Andy Goldstein (Complainant) v. Star Bedding Products Limited (Respondent) v. Upholsterers International Union of North America, Local 400 (Intervener). (*Dismissed*).

0704-75-U: Lewis Stevens of Heat Transfer Worker's Union (Complainant) v. Heat Transfer Worker's Union Ex. Committee (Respondent). (*Withdrawn*).

0709-75-U: Hotel & Restaurant Employee's and Bartenders' International Union, Local 280 (Complainant) v. Bramfield Restaurants Ltd. Known as The Forge Tavern (Respondent). (*Withdrawn*).

0710-75-U: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Complainant) v. Kunzelman Limited (Respondent). (*Withdrawn*).

0729-75-U: Ontario Nurses' Association (Complainant) v. The Pines Nursing Home Limited (Respondent). (*Withdrawn*).

0734-75-U: Ernest D'Andrea (Complainant) v. Luigi Fanelli (Respondent). (*Terminated*).

0750-75-U: International Association of Machinists (Complainant) v. Venus Electric Limited (Respondent). (*Withdrawn*).

Applications Under Section 39 Disposed of During August

0601-75-M: John Kieft (Applicant) v. United Steelworkers of America, Local 8401 (Respondent Trade Union) v. Bonar Bemis Ltd. Plastic Div. (Respondent Employer). (*Granted*).

0602-75-M: Charles Vanyken (Applicant) v. United Steelworkers of America, Local 8401 (Respondent Trade Union) v. Bonar & Bemis Ltd., Plastic Division (Respondent Employer). (*Granted*).

Reference to Board Pursuant to Section 96

0570-75-M: Cond-Air Company Limited (Employer) v. Refrigeration Installation and Service Mechanics and Apprentices of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 787 (Trade Union). (*Granted*).

Applications for Reconsideration of Board's Decision – Certification

6967-74-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. O-Be-Sh-Ko-Ka Ear Falls Metis & Non Status Indian Association (Respondent). (*Request Denied*).

7357-74-R: Diamond "Z" Association (Applicant) v. Zehr's Markets Limited (Respondent) v. Retail Clerks International Association (Intervener #1) v. Retail Clerks International Association, Local 206 (Intervener #2). (*Request Denied*).

7533-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. D.V. Contracting Company (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2). (*Request Denied*).

7534-74-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. D.V. Contracting Company (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons and Plasterers International Union of America (Intervener). (*Request Denied*).

0178-75-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Donaldson & Barron Ltd. (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A. (Intervener #2). (*Request Denied*).

0443-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Domti Construction Limited (Respondent). (*Request Denied*).

0577-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ferrantone Construction (Respondent). (*Request Denied*).

Application for Reconsideration of Board's Decision – Termination

7465-74-R: Employees (Applicant) v. International Woodworkers of America (Respondent). (*Request Denied*).

Application for Reconsideration of Board's Decision – Prosecution

7579-74-U: Office and Professional Employees International Union (Applicant) v. Weingarden & Hawrish (Respondent). (*Request Denied*).

Application for Reconsideration of Board's Decision – Section 79

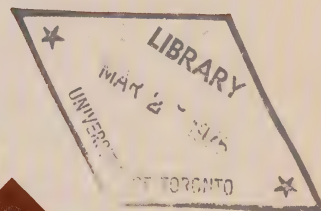
5345-73-U: Robert E. Gibb (Complainant) v. United Brewers' Warehousing Workers' Provincial Board, representing Local and Branch Unions of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C. (Respondent) v. Brewers Warehousing Company Limited (Intervener #1) v. United Brewers' Warehousing Workers Provincial Board representing International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (Now merged and affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) (Intervener #2). (*Request Denied*).



Labour
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0671-75-R Association of Professionat Student Services Personnel, (Applicant) v. **THE BOARD OF EDUCATION FOR THE BOROUGH OF SCARBOROUGH** (Respondent).

BEFORE: George W. Adams, Vice-Chairman, and Board Members H.J.F. Ade and D.B. Archer.

APPEARANCES: Michael Gordon and Elizabeth Carveth for the applicant; N. MacL. Rogers, Q.C. for the respondent.

DECISION OF THE BOARD: September 24, 1975.

1. This is an application for certification.
2. The applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The parties agreed that the bargaining unit be described in terms of all psychologists, assistants in psychology, and social workers, and they also agreed that the exclusions be described as attendance counsellors, chief psychologists and chief social workers, persons above the rank of chief psychologist and chief social worker, and persons regularly employed for not more than 24 hours per week. However, the respondent requested that the bargaining unit be limited to its Student Services Department and that psychologists employed on a "limited" contractual basis to engage exclusively in research be excluded. With regard to this latter submission, the respondent argued that the persons in question were employed by way of provincial grants and that a collective agreement might impede the availability of such people.

On the other hand, the applicant submitted that a number of persons falling within the scope of the respondent's proposed bargaining unit perform similar research and that therefore the exclusion of the persons in question ought to be a matter for collective bargaining between the parties.

4. Except in the newspaper industry (see *Telegram Publishing Co. Ltd.* 59 CLLC ¶18,126, and *Globe and Mail Ltd.*, 63 CLLC ¶16,290) the Board does not generally describe bargaining units with reference to an employer's departmental structure. The respondent's submissions have not persuaded us to abandon this policy and its request for a departmental unit is rejected.
5. Furthermore, we are not prepared to specifically exclude those psychologists employed for a limited period from time to time. It would appear that they perform work not unlike that performed by the employees who the parties agree are in the bargaining unit. And to this date, the Board has not considered the term of employment a relevant consideration in determining whether an employee should be granted collective bargaining rights or be included in a bargaining unit. (See *Toronto Driving Club List* [1964] OLRB Rep. Apr. 33 and *Chapples Stores Ltd.* [1970] OLRB Rep. Apr. 70, [1970] OLRB Rep. June 313.)
6. Therefore, having regard to both the agreement of the parties and the Board's practices, we find all psychologists, assistants in psychology and social workers employed

by the respondent in the Borough of Scarborough, save and except chief psychologists and chief social worker, attendance counsellors, and persons regularly employed for not more than 24 hours per week constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees in the bargaining unit, the applicant on September 10, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

0561-75-R United Steelworkers of America, (Applicant) v. SECORD MANUFACTURING LIMITED, (Respondent) v. Group of Employees, (objectors).

BEFORE: George W. Adams, Vice-chairman, and Board Members L. Hemsworth and P.J. O'Keeffe.

APPEARANCES: *P. Warrian and B. Desroches for the applicant; M.G. Mitchwick, S. Bellissimo, M. Ausman and B. Johnson for the respondent; C.W. Baker and H. Vandenberg for the objectors.*

DECISION OF VICE-CHAIRMAN GEORGE W. ADAMS AND BOARD MEMBER P.J. O'KEEFE: September 18, 1975.

1. This is an application for certification.

2. The applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*, R.S.O. 1970, c. 232.

3. A question arose as to the status of Mr. G. Jay classified by the respondent as a "working foreman" He assigns work. He initials time cards, thereby recording the movement of employees. He approves changes to blueprints.

The respondent is in the business of constructing heavy cranes and Jay is said to be the respondent's most experienced employee. He has thirty years' experience as a fitter welder and has worked for the respondent for eight years. He is paid an hourly rate and participates in overtime. He has no authority to hire, discharge or discipline employees but he has reported disciplinable incidents to Mr. B. Johnson, the plant manager. Apparently he does not make recommendations on these occasions and therefore, although Johnson's decisions are communicated by Jay, Jay is not required to make independent judgments in regard to such matters.

The Board was informed that sixty per cent of Jay's working time is allocated to manual tasks and the remaining forty per cent is devoted to reading blueprints, laying out

job assignments and assisting other employees. He does not have an office of his own but employees regard him as their supervisor.

Finally, the respondent describes Mr. Jay's position as that of a working foreman and it would appear that the employees view him as a "foreman", "boss" or "supervisor"

4. While it was observed in *Pre-Con Murray Limited* [1965]OLRB Rep. August 328 that in an industrial context the Board's long established rule of thumb is that a person classified as a foreman is excluded from the bargaining unit by section 1(3)(b) of the Act, this rule of thumb can be rebutted by the evidence. (See *United Steelworkers of America and McIntyre Porcupine Mine Limited* (Board File 4373-73-R).) In the facts at hand we find the presumption of exclusion has been rebutted.

5. As noted in the *McIntyre Porcupine Mine Limited* case the fact that a person engages in the supervision of the work of others is not a reason, in and of itself, for finding that the persons exercises managerial functions within the meaning of section 1(3)(b). The purpose underlying section 1(3)(b) is the prevention of significant conflicts of interest – conflicts that would arise if a person who could materially affect the economic lives of employees was included in the bargaining unit. This is not the case with regard to Mr. Jay. We are satisfied that his supervisory duties are primarily co-ordinative in nature and for the purposes of labour relations he performs a "conduit function" for Mr. Johnson, the plant manager. The facts agreed to by the parties suggest that Mr. Jay is a senior employee and the respondent relies upon his technical knowledge and skills in the area of blueprints and job layout. But we cannot find that this reliance converts Mr. Jay's status to that of a person outside the coverage of the Act' In this regard we rely upon the following reasoning of the Board expressed in *The Hydro-Electric Power Commission of Ontario* [1969] OLRB Rep. August 669 at para. 8 and para. 9:

"8. With the rapid advance of technology and the use of more sophisticated management tools, an ever increasing number of persons are becoming actively involved, in varying degrees in all aspects of improving public relations, efficiency, productivity and in controlling the cost of production. As more persons become involved in these matters, it becomes increasingly difficult to distinguish between persons who exercise managerial functions within the meaning of section 1(3)(b) of the Act and employees. The distinction can only be based on the evidence of the duties and responsibilities exercised by such persons in the particular case. Such decisions necessarily involve an empirical determination of whether the person who may perform functions which relate to or bear upon the improvement of public relations, efficiency, productivity or cost, is in fact controlling or determining the process or is merely implementing a process which has been predetermined by some person in management. It cannot be denied that these matters are properly the concern of management. However, if the person is merely implementing a decision made by another and has little latitude to use any independent discretion except in predetermined circumscribed areas, such person cannot be said to be exercising managerial functions. If, on the other hand, a person has the independent discretion to formulate policy and methods or sets the necessary guidelines for others to follow, such

functions may properly be described as managerial functions. These latter functions are readily distinguishable from the functions performed by persons who merely gather or collate information which will be acted upon by a member of management.

9. In addition, the fact that managerial persons rely on the expertise of senior employees or employees who possess highly technical knowledge and skills, and act upon the advice of such persons, does not change the nature of the functions exercised by the employees. The fact that an expert employee may recommend a course of action which a member of management may decide to follow does not of itself make the employee's recommendation a managerial function. Although a recommendation may be the basis of the decision taken, however, it is the *decision* to implement the recommendation which can correctly be described as the managerial function. If a person actively participates in the making of such decisions on a regular basis he may be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act."

6. Accordingly we feel that Mr. Jay is an employee for the purposes of the Act and we would further find all employees of the respondent at its manufacturing plant at Hamilton, Ontario, save and except the plant manager, persons above the rank of plant manager, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. Having regard to the findings above, the respondent filed lists of employees showing sixteen employees employed in the bargaining unit at the date of application and the applicant filed membership evidence in regard to eleven of these employees. However, before the terminal date a statement of desire in opposition to the applicant bearing the signatures of five persons purporting to be employees in the bargaining unit was filed with the Board. Two of these signatures correspond with the membership evidence filed by the applicant. The Board therefore inquired into the origination and circulation of the statement of desire.

8. The preamble to the statement of desire reads:

"We, the undersigned, do hereby formally and collectively voice our objection to being represented by the United Steelworkers of America at Secord Manufacturing Limited, 555 Parkdale Avenue North, Hamilton, Ontario."

9. Carl Wagner Baker and John Vandenberg gave evidence in support of the document and their signatures respectively, on the document.

10. Baker's testimony, on being questioned by the Board, was as follows. The notice of the application for certification was posted in the plant on Thursday, July 10, 1975. This was the first time the witness and John Vandenberg knew anything of the trade union – they had been ignored apparently. Baker and Vandenberg discussed the application and the possibility of opposing it on Thursday and Friday. And Baker testified that at 4:00 p.m. on Friday, Mr. Bill Johnson, the plant manager, happened to be reading the posted notice and

Baker told him he wanted to protest the application and asked Johnson what to do. Apparently, only after this question Johnson directed the witness's attention to paragraphs four and five of the notice. John Vandenberg was also standing there at the time.

Vandenberg and Baker again discussed their opposition to the application at work on the Saturday and Baker drafted the very concise and formal preamble, without any assistance, on the Sunday at his home. The witness then told the Board that he brought the document into work on Monday but later changed this to Tuesday. In making this revision he said that on Monday he and Vandenberg spoke to "the employees" about signing a statement in opposition to the application but the statement was left at home.

On Tuesday Baker brought the statement to work and put it in his tool box. The lunch break at the respondent's plant is from 12:00 to 12:30 p.m. on Tuesday, Baker ate his lunch and then took the petition to the stock room where he proceeded to obtain the signatures of the four other employees, his signature being on the document already. These signatures were obtained as the employees wandered into the stock room. Mr. Jay, who normally eats his lunch in the stock room, did not take his lunch there that day. Baker testified that the last signature was obtained at 12:30 p.m. He then took the document out to his car and put it under the seat. At 5:00 p.m. he left work and mailed the document.

11. However, on cross-examination by the applicant the witness testified that he and Vandenberg punched out at 12:30 p.m. to drive to the home of an employee who was absent to request him to sign the document. Mr. Jay happened to wander by the clock at 12:30 p.m. and Baker sought his permission to leave. However, he gave Jay no reasons in support of the request and none were requested. Vandenberg and the witness were absent until 3:30 p.m. when they punched back in and again no questions were asked of them. The two employees work together and presumably their work remained undone during this period. Baker testified that he has two small children and often has to leave work. And Baker said Vandenberg drove him in Vandenberg's car because the power steering hose on his (Baker's) car was broken.

12. Responding to questions from the Board, Vandenberg testified that Baker asked him to go with him because he did not want the union either. He further testified that he sought Jay's permission to leave and no questions were asked of him. However, he informed the Board that he had recently been on compensation and this had necessitated his absence from work to see a doctor occasionally.

13. On cross-examination by the trade union, the witness admitted to approaching Mr. Johnson for his views on the subject. He told the Board that he went to Johnson's office at 6:25 Friday morning and "asked Johnson about paragraphs 7 and 8 (of the green sheet) – whether we needed evidence."

On reflection the witness stated that this meeting may have been Monday at 3 o'clock. But whatever day it was the witness was firm on the content of the meeting and stated that it lasted three or four minutes".

14. The trade union and the company did not introduce any evidence in regard to the testimony of these two witnesses.

15. The Board must be satisfied that a statement of desire represents a voluntary expression of the employees who sign it. And in order to satisfy itself in this regard the Board places the burden of proof in this regard upon the persons relying on the document. They know the circumstances surrounding its origination and circulation best. Further, it is they who wish the Board to consider the document and to order a representation vote in circumstances that would otherwise entitle both the trade union and the employees who support it to outright certification.

16. The rationale supporting the Board's detailed scrutiny of such documents was recently reviewed in *Toronto Newspaper Guild, Local 87 and CCH Canadian Limited* [1974] OLRB Rep. Jan. 19. The relevant paragraphs read:

"10. In certification cases the Board is called upon from time to time to consider documents filed by employees in opposition to the application. Very often these documents follow closely on the heels of evidence in support of the trade union executed by the very same people causing the Board to question the voluntary nature of the subsequent expression in light of the natural inclination of an employee to identify himself with the interest and wishes of his employer. This concern was capsulized in *Welders, Public Garage Employees, Local 8417 and Pigott Motors (1961) Ltd.*, (1962), 63 CLLC 16,264 where the Board observed:

"There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of evidence in a form and of a nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, *CCH Canadian Law Reporter*, 1955-59, Transfer Binder ¶16,114 at p. 12,209, and the *Fleck Manufacturing Ltd. Case*, *CCH Canadian Labour Law Reporter*, vol. 1, ¶16,236, at p. 13,201.).

Therefore because employees are peculiarly susceptible to influence by an employer the Board requires the first hand evidence of both the origination and circulation of the petition as outlined in Rule 48. Only

when this evidence is forthcoming is the Board in a position to determine that the statements of desire are an accurate reflection of the wishes of the employees who have signed them. In fact, the Board has been so conscious of the considerations outlined in *Pigott Motors (1961) Ltd.*, *supra*, that it has placed great significance upon the custody of the petition throughout the period when it is being signed. If the custody cannot be substantially documented by direct evidence through this document (see *Vereal and Harvey Company Limited* [1971] OLRB Nov. 736 and *Formosa Spring Brewery* [1974] OLRB Sept. 604).

11. Those requirements are often contrasted with those imposed upon trade unions in the certification process as did Mr. Irwin in his dissent in *Remington Rand Limited* 63 CLLC ¶16,288 where he noted that the same kind of evidence is not required. And Mr. Heather representing the employer in this case took essentially the same position. But this perspective, as noted in the chairman's addendum in *Remington Rand Limited*, *supra*, ignores the experience and concern reflected in the excerpt from the *Pigott Motors (1961) Ltd.* case. Furthermore, in an application for certification the Board requires a trade union to establish its status; to submit membership evidence in a prescribed form and accompanied by the payment of \$1.00; and to file a declaration concerning membership documents attesting to the accuracy of such documents (Form 7). The consequences of defective membership evidence or non-disclosure can be very severe, (see *National Steel Can. Corp. Ltd.* [1966] OLRB Jan. 738 and *Stanley Steel Company Limited* [1972] OLRB Feb. 181, in this regard)".

17. Having regard to all of the evidence the Board is not satisfied, on the balance of probabilities, that the statement of desire in question reflects the true wishes of employees who signed.

18. When questioned by the Board Baker made no reference to the fact that he and Vandenberg were given permission to leave the work place Tuesday afternoon and that they were absent for three hours, although without pay. Until cross-examination Baker left the Board with the impression that he had simply put the document in the car at 12:30 p.m., that he returned to work; and that he then mailed the document at or about 5:00 p.m. This oversight raises a doubt in regard to the reliability of the witness's evidence. Moreover, if the three-hour absence is interwoven with the witness's initial evidence, one has the witness going out to his car at 12:30 p.m. to place the document under the seat of his car as if for safekeeping until 5 o'clock and then going inside the plant; requesting permission to leave the plant immediately; and then returning to his car to retrieve the document in order to drive, in Vandenberg's car, to another employee's home. The narrative lacks logic and suggests an attempt to conceal the departure from the plant from the Board.

19. Secondly, on cross-examination Vandenberg told the Board that he sought Johnson's views at 6:25 on Friday morning or some time Monday. And on this occasion he asked Johnson about paragraphs 7 and 8 of "the green sheet". However, this admission is inconsistent with Baker's evidence. Baker and Vandenberg were closely consulting with

each other from Thursday, July 10, 1975 and thus Baker's questions to Johnson at 4:00 p.m. on Friday, with Vandenberg standing nearby, would have been completely redundant if Vandenberg had asked the same questions that morning. Similarly, if Vandenberg really approached Johnson on Monday, all of his questions were answered Friday when, in his presence, Baker spoke to Johnson. These discrepancies undermine the integrity of the evidence of both witnesses.

20. Thirdly, Vandenberg and Baker took three hours off work with no questions being asked by either their supervisor or the plant manager. Each employee had left work before for other reasons but they had never left the premises together in as spontaneous a fashion as they did on Tuesday, July 15, 1975. It is therefore difficult to believe that no questions would have been asked in the circumstances.

21. Fourthly, Johnson's contacts with the witnesses were not clearly developed. The witnesses were unclear in regard to the exact content of his responses to their questions and Johnson did not come forward and give evidence about these occasions. When an employer does respond to inquiries from employees it ought to be prepared to give evidence in regard to its responses, particularly in those situations where confusion in testimony is obviously present.

22. And finally, after carefully listening to Mr. Baker give his evidence, the particular wording of the preamble to the statement of desire raises some doubt that the witness prepared it without assistance.

23. While none of these observations, standing alone, might be determinative of the issue before the Board, their cumulative effect must cause this Board to find as it has. The statement of desire is therefore dismissed.

24. Having regard to all of the evidence before it the Board is satisfied that more than sixty five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 15, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j), of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER L. HEMSWORTH:

I dissent.

The Board here, in my opinion, is conferring bargaining rights on a bargaining agent without evidence that the agent represents the necessary majority of the employees.

There is no evidence that the five employees who signed the statement that they did not wish to deal with their employer through a third party did so under duress or at the behest of their employer.

Nowhere could the Board find the justification to discard the petition because of any illegal activity.

To achieve this end the Board had to reply on what it called “the cumulative effect” of several unrelated incidents.

These, as I heard the evidence, encompassed the following:

No mention was made, initially, that an unsuccessful attempt was made to obtain the signature of a sixth employee who was absent from work. Great weight was then given to the fact that this irrelevant information was brought out in cross-examination, and that the witnesses left the plant to visit the employee at his home.

The mores of this plant community grant employees a degree of personal freedom, increasingly prevalent today, to control their own work, including the time tasks are performed. The evidence was that each of the witnesses had on previous occasions left the plant during the day, without permission or explanation, as they did on this occasion. That they left together “in a spontaneous fashion” is deemed sufficient in this instance to cause the Board to disbelieve their sworn testimony.

The preamble to the petition was too well written! Presumably the absence of clerical errors and the inclusion of some pseudo-legalistic terms was enough to deny the witness’s statement of authorship. The intensity of the Board’s questioning on this point is revealed by the witness’s frustrated comment, “Just because I am a steel worker doesn’t mean I’m stupid” – or words to that effect.

The questioning was intense and distrustful. Counsel and the Board members are experienced and skilled at examination. The witnesses were not well prepared and clearly not familiar with the setting or the proceedings. I am satisfied they were surprised at the severity of the examination and the demonstrated distrust in their sworn evidence. In short, in my evaluation, the omissions and inconsistencies – such as they were – were readily explained by the atmosphere.

The Board’s refusal to recognize the petition signed by the five employees denies the employees a right to a secret ballot vote. In the absence of such a vote it is impossible to know whether the bargaining agent does indeed represent the employees. I, personally, on the basis of the evidence, do not believe that the necessary majority had so expressed themselves, and a vote should have been permitted.

0503-75-U United Steelworkers of America, CLC, (Complainant) v. **Fielding Lumber Company Limited**, (Respondent).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and H. Simon.

APPEARANCES: *Lennox A. MacLean and James Keuhl for the complainant; K.R. Valin and D. Fielding for the respondent.*

DECISION OF GEORGE W. ADAMS, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON: September 19, 1975.

1. This is a complaint under section 79 of the legislation. The complainant alleges that the grievors were dealt with by the respondent contrary to the provisions of sections 3, 56, 58 and 61 of *The Labour Relations Act*.

2. At the outset of the hearing counsel to the complainant submitted that *The Labour Relations Act*, R.S.O. 1970, c. 232, section 79 has been amended by Bill 111, An Act to Amend The Labour Relations Act, section 21, and that the amended provision therefore applied to the complaint. The complaint was filed on June 23, 1975 and arose on June 9, 1975. Bill 111 received Royal Assent on July 18, 1975. Section 33(1) of Bill 111 reads:

This Act, except subsection 1 of section 1, subsection 4 of section 3 and sections 6, 12 and 31, comes into force on the day it receives Royal Assent.

3. Section 21 of Bill 111 reads:

21. – (1) Subsections 1, 2, 3 and 4 of section 79 of the said Act are repealed and the following substituted therefor:

(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

(2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The labour relations officer shall report the results of his inquiry and endeavours to the Board.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

(4a) On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

- (2) Subsection 6 of the said section 79 is amended by striking out "field" in the second line and inserting in lieu thereof "labour relations" and by striking out "clause a, b or c of subsection 1, as the case may be" in the eleventh and twelfth lines and inserting in lieu thereof "subsection 1".

It was agreed that section 79(4a) of the amended legislation places the burden of proof that the Act has not been contravened on a respondent employer and, in doing so, it was submitted that section 79(4a) was a procedural enactment. For the latter proposition *Rex v. Kumps* [1931] 3 DLR 767 (Man. C.A.); *International Union of Operating Engineers v. Kaiser Resources Ltd.* 71 CLLC 14,079 (B.C.S.C.); and *Re Grimshawe* [1950] 4 DLR 781 (Ont. C.A.) were relied upon. It was further submitted that, being a procedural provision, it should apply retrospectively in the sense that it should apply to matters that had arisen and been filed before the enactment of the provision provided that the matters had not been yet heard by the board. In support of this proposition the complainant relied upon *Yvon Robichaud* [1971] OLRB M.R. June 305; *George Freres and U.A.W. and Douglas Aircraft Company of Canada Ltd.* [1974] OLRB M.R. Sept. 577; *StBves v. Dufferin Rm. Mun.* (1935) 1 DLR 203 (Man. C.A.); *Stephenson v. Parkdale Motors et al*, [1924] 3 DLR 663 (Ont. S.C.); and *Maxwell on Interpretation of Statutes* (12 Ed.) p. 222.

4. The respondent did not contest the complainant's submissions in this regard and, having reviewed the authorities, we accept them. Thus, for the reasons argued by the applicant, we find that *The Labour Relations Act*, R.S.O. 1970, c. 232, section 79, as amended by Bill 111, Fifth Session, 29th Legislature, Ontario, 24 Elizabeth II, 1975, section 21, (S.O. 1975, c. 79) applies to the complaint.

5. Counsel to the grievors went on to submit that the respondent shouldered not only the ultimate burden of proof but also the initial burden of going forward – a burden that might be termed the "evidential burden". (See R. Cross, *Evidence* (3d ed., 1967 67-70.)

6. The respondent accepted the initial evidential burden in regard to the complaint of Mr. Frank Truderung but argued that even under section 79(4a) it had no evidential obligation in regard to the claims of Brian Cullen, Dan Cullen, Robert Naponse, Noel Poitras, Ester Whitmarsh and Rose Jackson. These latter persons claim the respondent discharged them contrary to the legislation whereas the respondent submits that they quit their employment. Thus the respondent submitted these persons had to establish at least a *prime facie* case that they had been discharged as claimed.

7. Following these submissions the Board requested the respondent to adduce its evidence first and that the evidence should relate to the claims of Brian Cullen, Don Cullen, Robert Naponse, Noel Poitras, Ester Whitmarsh and Rose Jackson as well as to Frank Truderung's claim. First, an examination of the particulars filed with the complaint suggests that all the claims arise out of a common fact situation and the Board believed that it would be chaotic and inefficient to split Truderung's claim from those of the other persons for procedural purposes. Second, even if this Board eventually accepts the proposition that at the beginning of litigation under section 79(4a) the evidential burden can reside with a party other than the party shouldering the legal burden, it did not appear that this case required such an approach. The respondent did not argue that the grievors possess peculiar knowledge of facts fundamental to defending against the claims and that for reasons of fairness and policy the Board ought to require them to shoulder the initial evidential burden. Rather the respondent attempted to rely upon a legal distinction between the discharge of an employee and the voluntary quitting of employment by an employee – a distinction that can be a very important preliminary matter in the course of a grievance arbitration. (see *SCM (Canada) Ltd.* (1964) 15 L.A.C. 332 (Reville).) But given the broad wording found in sections 58 and 56, the distinction is of little assistance to this Board in considering complaints under section 79. For example, an employer can violate section 58 by refusing to employ a person for improper reasons. The section is not designed to limit relief to employees. Therefore, even on a pragmatic approach to the allocation of the evidential burden, we saw no justification for asking the grievors to proceed first.

8. The complainant applied to be certified as the exclusive bargaining agent for the employees of the respondent on December 23, 1974. A certificate was granted by the Board on January 20, 1975 but the parties have not yet arrived at a collective agreement, prior to this decision three employees, Robert MacEwan, William Mills and Brian Cullen, were terminated from the respondent's employ on December 31, 1974, January 6, 1975 and January 3, 1975, respectively. And by a decision of the Board, dated February 25, 1975, it was determined that their terminations were contrary to *The Labour Relations Act*. The respondent was directed to reinstate these people in its employ and to compensate them for their monetary losses. A first request for reconsideration of the decision was denied by a decision dated March 20, 1975. A second request for reconsideration was denied by a decision dated April 10, 1975. And a decision in regard to the actual compensation owing as a result of the February 25, 1975 decision was rendered on May 30, 1975. The Board is entitled to take notice of these proceedings but only for a very limited purpose, in its opinion. See *Regina v. Ontario Labour Relations Board, Ex parte Trenton Construction Workers Association, Local 52* [1963] 2 O.R. 376 (O.H.C.). More specifically, we recite the course of these earlier proceedings only to establish that the matters affecting MacEwan, Cullen and Mills were not effectively concluded until May 30, 1975; that they involved unfair labour practice charges; and that the parties had not entered into a collective agreement when this matter arose.

The decisions of the Board in these earlier proceedings cannot be used as evidence of the respondent's anti-union animus in June of 1975 and the decisions do not estop the respondent from adducing evidence in regard to the terminations of at least MacEwan and Mills, to the extent that the events surrounding those terminations are relevant in the proceedings before us. In other words, the facts and legal conclusions surrounding these earlier determinations are not *res judicata* between the parties before us. The requirements of the doctrine of *res judicata* were reviewed in *Re Bullen* (1972) 21 DLR (3d) 628 at 631 (B.C.S.C.) and need not be considered in detail here. It is sufficient to say that, save for Brian Cullen, we do not believe that the parties before us are the same parties as in the earlier proceedings. In regard to Brian Cullen's complaint the parties are identical and, while we are not confronted with "cause of action" estoppel, the concept of issue estoppel outlined in *Carl-Zeiss-Stiftung v. Rayner and Keeler* (No. 2), (1966), 2 ALL E.R. 536 at 550 would appear to apply. (See also *Flutters v. Allfrey* (1894) L.R. 10 C.P. 29 and in *Beeches Workmen's Club and Institute Trustees v. Scott* (1969) 1 WLR 550 (C.A.).) But no more extensive discussion of this issue is required in that our findings and legal conclusions on the evidence placed before us – *viva voce* evidence that included the relevant details surrounding the earlier determinations – uphold the claims of the grievors. In other words, with respect to the terminations of Cullen, Mills and MacEwan, the grievors did not rely on the earlier determinations exclusively (*they adduced additional viva voce evidence*) and we permitted the respondent to adduce evidence in regard to these earlier matters as well.

9. The respondent's case was straight-forward and concise. Mr. Cecil Fielding, chairman of the respondent's board of directors, Mr. Donald Fielding, president of the respondent, and Mr. Orel Plouffe, a foreman, denied speaking with any of the respondent's employees between December 23, 1974 and June 9, 1975 about the application for certification or about anything else connected with their trade union activity. It was the evidence of these persons that Frank Truderung had received written warnings on January 31, 1975 and February 4, 1975 for damaging company equipment and that at approximately 8:30 a.m. on June 9, 1975 he was dismissed for operating the debarker machine "with a tooth (on the machine) missing". The missing tooth had been discovered by Cecil Fielding on Saturday, June 7, 1975, after a routine check.

The dismissal was announced before a group of employees who had been assembled by Plouffe on the direction of Cecil and Donald Fielding. Cecil Fielding told the Board that the employees were assembled to witness the termination in order to demonstrate what would happen if they abused machinery. However, Donald Fielding explained the method of termination as primarily an effort to combat the rumours that had been circulating in regard to the earlier decisions made by the respondent – rumours that he felt had arisen because the employees had no firsthand knowledge of the decisions. The persons who have filed complaints walked off the job when Truderung was dismissed and the respondent takes the position that by doing so they quit. It is not disputed that Brian Cullen, Dan Cullen and Noel Poitras witnessed Truderung's termination and as they left the respondent's premises Robert Naponse, Ester Whitmarsh and Rose Jackson joined them. Nor is it disputed that on their return to the respondent's operation at about 10:30 a.m. that day, Donald Fielding told them that their "time was being made out". All refused to sign Unemployment Insurance Record of Employment slips because the respondent had marked on the slips that they had quit.

10. Against this evidence we must analyze the evidence submitted on behalf of the grievors and consider the inferences to be drawn from the demeanour of all the witnesses as they gave testimony.

It was admitted that in 1970 or 1971 the International Labourers Union, Local 183 was certified to represent employees of the respondent. No collective agreement was ever consummated and eventually a successful application for the termination of bargaining rights was brought before the Board. It was also admitted that a union called the Northern Ontario Pallet Union was interested in organizing the respondent's employees about that same time but was unsuccessful. It was further admitted that prior to the written warnings issued to Frank Truderung the respondent had never issued written warnings to any other employees.

Frank Truderung gave evidence before the Board. He testified that he and Robert Naponse were responsible for the United Steelworkers of America (hereinafter referred to as the "Steelworkers") application for certification. Truderung contacted Mr. James Keuhl, a representative of the Steelworkers, and provided him with the names and addresses of the respondent's employees. Following this, Truderung, Naponse and Keuhl attended the homes of each of the employees to obtain signed membership cards. Truderung testified that on December 31, 1974 Donald Fielding approached him and accused him of organizing the employees. He further claims that Fielding told him that the respondent had "broken" one union and that it would break the next one. Robert Naponse, who was standing nearby, confirmed Truderung's evidence in this regard. Truderung told the Board that throughout the period from December 23, 1974 to the date of his termination Plouffe, his foreman, often spoke to him about the feasibility of trade union representation and the likelihood of success for the unfair labour practice complaint of Mills, Cullen and MacEwan. And it is Truderung's evidence that towards the end of January or early February, after a somewhat heated exchange with Plouffe, he told Plouffe that he and Robert Naponse had organized the employees and that the trade union was "all around him".

11. Similar evidence of the respondent's knowledge of and interest in the trade union activity of its employees was given by Robert MacEwan, William Mills, Brian Cullen and Ester Whitmarsh. MacEwan testified that on December 31st Donald Fielding asked him if he had heard anything about a union. He asked who had joined the union and who was organizing the employees. MacEwan did not tell him. Fielding is reported to have then warned that the respondent had fired a number of people before and that it was prepared to do so again. MacEwan said Fielding emphasized that the respondent would not let a trade union take over. MacEwan says he was reminded that quite a few lumber mills in the area had closed up, and a lot of people were therefore out of work.

Mills testified that on January 6, 1975 Cecil Fielding showed him a list of the employees who had signed with the trade union. Mills told the Board that Fielding said it was the respondent's policy not to hire anyone having anything to do with a trade union. Mills said he noticed MacEwan's name and his own on the list. Finally, Mills testified that Fielding advised him that women who had been fired because of the earlier applications for certification were still trying to get back into the employ of the respondent.

Cullen testified that on December 31, 1974 Donald Fielding asked him if he knew anything about a trade union and, on replying that he did not, Fielding told him that if he did he would lose his job.

Ester Whitmarsh testified that in January Cecil Fielding asked her for the names of women who wanted to work but women who would not join the trade union.

12. Truderung denied abusing the respondent's machinery. In regard to the written warning dated Friday, January 31, 1975 he said that the day before it was issued he told Plouffe that teeth on the debarker were missing and Plouffe told him "to keep peeling". In regard to the second warning dated Tuesday, February 4, 1975 he testified that Plouffe had been examining the debarker and in doing so the head on the machine stuck. Plouffe then instructed Truderung to assist him in solving the problem and as a result of his efforts under Plouffe's directions, the machine's motors burned out. The written warning, handed to Truderung by Cecil Fielding, reads:

NOTICE TO FRANK TRUDERUNG

Dear Sir:

on Friday January 31, you were handed a warning concerning your practice of malicious sabotage to Company property. Within 1-1/2 hours you burnt out a motor on the debarker. The reason your foreman advised management was you had not done your maintenance on the travelling pipes for the head motor and the situation still remains the same. (There is dried sap on the pipes which should be kept scraped off and the pipes should be oiled daily).

This is your last warning.

(sgd) "Cecil Fielding"

After receiving this warning, Truderung became upset and spoke to Plouffe. He claims Plouffe admitted responsibility for the motor and said he had had nothing to do with the warning.

Robert MacEwan testified that he had operated the debarker for a considerable period of time and that he had trained Truderung. He told the Board that he had burned out "three or four motors" and had never received a warning on any such occasion. He further testified that he had frequently operated the debarker with teeth missing. He said that if the repair of teeth would interfere with production, Plouffe permitted him to continue operating until the end of the day. He had not received any warnings in this regard. MacEwan described the debarker – a machine designed to take the bark off logs – as having three dozen teeth attached to an aluminum head. It was MacEwan's opinion that if only a few teeth were missing from the machine, the remainine teeth would prevent damage to the aluminum head.

13. Truderung told the Board that on Thursday, June 5, 1975 he noticed a tooth missing. The bolt for the tooth was apparently broken and for this reason Truderung could not fix it himself. He therefore reported the matter to Nick Nester – the employee responsible for maintaining the respondent's equipment. Nester is reported to have told Truderung that he had no time to fix the tooth. Truderung testified that he told Plouffe about Nester's response later in the day. Nester did not return to fix the machine and Truderung operated it on both the Thursday and the Friday with the tooth missing.

Then, according to Truderung, on Monday, June 9 Cecil Fielding called him over to the debarker before work had begun and, in front of a number of other employees who had been assembled by Plouffe and Donald Fielding, reviewed Truderung's previous warnings; pointed out the missing tooth; and told him his services were no longer required. Brian Cullen, Dan Cullen, Noel Poitras and Nick Nester, as well as three other employees, were present. Brian Cullen and Truderung testified that as Fielding addressed the employees Nester told Fielding that Truderung had reported the missing tooth the previous Thursday. However, Fielding is said to have ignored Nester's information and proceeded to fire Truderung. The following letter of discharge – a letter that from its wording appears to have been prepared before Truderung's termination – was introduced into evidence by the respondent although it would not appear that this letter was ever given to Truderung.

June 9, 1975

You have been warned twice in writing about sabotaging our machinery. (Running the machinery with missing teeth.) You in front of all your fellow workers are accused of running your machine with a tooth missing again.

The Labour Relations Board will be advised that this is the third time you have been fired from this Company for mis-conduct and sabotaging our equipment.

Fielding Lumber Company Ltd.,
(sgd) "Cecil Fielding"

14. Following his termination Truderung began to leave the mill but returned to ask Brian Cullen who would report the incident to the trade union. Apparently his return caused a gathering of at least Brian Cullen, Dan Cullen and Noel Poitras and at this time Dan Cullen said he was leaving if the respondent was going to fire employees without a reason. Brian Cullen then said he was joining his brother and all three employees followed Truderung out of the mill. Once outside the mill they met Robert Naponse, coming from another location of the respondent's operations, and he was told that Truderung had been fired "for no reason". Naponse joined the group. He had been working with Rose Jackson and Ester Whitmarsh and these two women testified that they saw the men leaving and were informed by them of Truderung's termination. On receiving this information they too joined the group.

15. No member of the respondent's management inquired where the employees were going and the employees were not warned that they would be discharged or that their departures were going to be treated as a quitting of employment.

16. The employees went to Brian Cullen's house in that it was the closest at hand and they telephoned James Keuhl. Brian Cullen testified that the group had decided to leave the decision to return to work to him and as a result of conferring with him they returned to work about 10:30 a.m. But on arriving at the respondent's mill they were met by Donald Fielding who asked where they were going. On being informed that they were returning to work, Fielding told them their "time (was) being made out". However, when the employees then attended the respondent's office their pay checks were not prepared and they had to reattend later in the day. As noted above each employee refused to accept his or her "separation slip" because the slip indicated "quit" as the reason for termination. The final fact to be noted is that all the persons who have filed complaints are members of the Steelworkers.

17. The relevant substantive provisions of *The Labour Relations Act* R.S.O. 1970, c. 232, as amended by S.O. 1975, c. 76, read:

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

18. Having regard to section 79(4a) a respondent employer must satisfy the Board that in taking the actions it took it was in no way motivated by a grievor's union activity. Thus the Board need not find that an employer's sole reason for acting stems from the union activity of his employees to find a violation of the legislation but rather an employer must satisfy the Board that union activity played neither a major or minor role in regard to its impuned actions. (See *Regina v. Bushnell Communications Ltd.* (1973) 45 DLR (3d) 218; upheld (1974), 47 DLR (3d) 668; *Int'l Brotherhood of Electrical Workers, Local 529 v. Central Broadcasting Company Ltd.*, 75 CLLC 16,169.)

19. However, the Board must only be concerned with the motivation of an employer and cannot pass judgment on the fairness of its actions. The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce *The Labour Relations Act* – a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must also be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it.

20. Having considered all of the evidence and the demeanour of the witnesses as they gave evidence, we find that the respondent has failed to satisfy us, on the balance of probabilities, that Truderung's termination was not motivated, at least in part, by a desire to "interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union" contrary to section 56 of the legislation. We further find that the respondent has failed to satisfy us that Truderung's termination was not motivated, at least in part, by his continued trade union membership and his role in organizing the respondent's employees. Robert MacEwan testified that he had burned out motors and operated the debarker with missing teeth and yet he had never received a warning. As a result, the dismissal of Truderung, at a time when unfair labour practice proceedings involving three other employees were before the Board and at a time when the trade union and the respondent were negotiating their first collective agreement, cannot be said to accord with the past practice of the respondent. And in this sense his discharge is peculiar. Further, the respondent's letters of warning – letters that had never been used before – are overly strident in that the evidence in no way established "sabotage" – in fact the evidence did not clearly establish that Truderung merited any discipline on any of the occasions in question. Third, all of the respondent's witnesses denied speaking with the employees about any aspect of union activity. These denials do not accord with the Board's experience and understanding of labour relations settings. Truderung's evidence that he and Plouffe discussed the potential success of the unfair labour practice proceedings then pending before the Board and the value of collective bargaining is what one would expect in a small informal work place. The evidence of the respondent's witnesses in this regard – their denials being so complete – is unnatural. And being unnatural the Board prefers the evidence tendered on behalf of the grievors in regard to the conversations said to have occurred between the employees and the representatives of the respondent. Fourth, the testimony and demeanour of Cecil Fielding demonstrated a marked animosity towards the Steelworkers – if not to trade unions in general. The respondent failed to satisfy the Board that this animosity was a personal view that the witness could harness or prevent from affecting his business decisions. Finally, the reasons tendered by the respondent for dismissing Truderung before a group of employees were both inconsistent and unconvincing. Cecil Fielding testified that the reason for the procedure was to demonstrate to other employees that if they abused machinery they would be dealt with in a similar fashion. However the respondent adduced no evidence that the employees had been abusing equipment and that the problem therefore merited such a drastic and potentially inflammatory approach. On the other hand Donald Fielding emphasized that the procedure was intended to prevent the origination of rumours.

In light of these inconsistencies, and having regard to all the evidence presented on behalf of the grievors, the respondent has failed to satisfy us that Truderung's termination was not a preconceived exercise intended both to rid the respondent of an employee who had been instrumental in organizing his fellow employees and to demoralize all of the remaining employees who had joined the trade union that was, at that time, attempting to negotiate a collective agreement on their behalf.

21. The respondent argued that the trade union had been certified long before June 9th and it therefore had no reason to act for the reasons alleged. However the respondent did not establish a period of quiescence in its labour relations following the issuing of the certificate to the Steelworkers and, as we have noted, a collective agreement between the Steelworkers and the respondent has not been consummated. More specifically, unfair labour practice proceedings before the Board had only been terminated some nine days before

Truderung was terminated and the Board's compensation order was complied with no earlier than July 1, 1975.

22. Truderung is to be reinstated into the respondent's employ and is to be paid \$1,-092.00 for his loss of earnings sustained as a result of the violation.

23. We further find the respondent has failed to satisfy us that in refusing work to Brian Cullen, Dan Cullen, Noel Poitras, Robert Naponse, Rose Jackson and Ester Whitmarsh on their return to the respondent's premises on June 9, 1975, it was not acting contrary to sections 56 and 58 of *The Labour Relations Act*. The respondent's witnesses testified that they believed the grievors had quit their employment but by 10:30 a.m. it was clear to everyone that this was not the case. Moreover, none of the respondent's representatives took any steps to inquire where the grievors were going or to warn them of what steps the respondent would take if they walked off the job. The respondent did not impune the work records of these employees and very little lost production would have been sustained had the respondent permitted these people to work. As well, it would be clear to a reasonable person that these people left work because they were very upset over what they considered to be an unwarranted dismissal of a fellow employee – a dismissal that almost immediately followed the conclusion of Board proceedings dealing with the dismissal of three other employees.

Having regard to all of these circumstances the respondent has failed to satisfy us that its actions in regard to these persons was not, at least in part, the seizing of another opportunity to demoralize its employees and thereby rid itself of the trade union certified to negotiate a collective agreement on their behalf. Thus, whether the employees' conduct can be construed as a quitting of employment or not, we are not satisfied that the respondent's reaction was motivated by *bona fide* business considerations. Accordingly, we find that the respondent violated sections 56 and 58 of *The Labour Relations Act* and we direct that Brian Cullen, Don Cullen, Noel Poitras; Robert Naponse, Ester Whitmarsh and Rose Jackson be reinstated immediately into the respondent's employ. These persons are not, however, entitled to monetary compensation. In walking off the job they engaged in an unlawful strike and thereby violated section 63(2). This kind of self-help can only serve to undermine the orderly procedure of redress provided for by the legislation and add to industrial conflict. We therefore have denied compensation to these people in order to bring home the wrongfulness of their actions and to discourage generally such actions in the future.

DECISION OF BOARD MEMBER J.D. BELL:

1. I dissent.

2. I disagree with that part of the decision of the majority of the Board which directs the reinstatement of Brian Cullen, Dan Cullen, Noel Poitras, Robert Naponse, Ester Whitmarsh and Rose Jackson.

3. The decision to walk off the job and engage in an unlawful strike in violation of section 63(2) of the Act was a voluntary act taken by the individuals. It may well be they were upset but this does not justify unlawful conduct.

4. I would find that their termination from employment was not a violation of sections 56 or 58 of the Act but the result of their unlawful conduct.

5. I would deny reinstatement as well as compensation.
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0652-75-U GINA ERCEGOVIC, (Complainant) v. United Glass and Ceramic Workers of North America-Local 260, (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members D. B. Archer and J. E. C. Robinson, Q.C.

APPEARANCES: *P. Haney and G. Ercegovic for the complainant; I. Springate, R. Bezo and D. Clark for the respondent.*

DECISION OF THE BOARD: September 16, 1975

1. This is a complaint filed under section 79 of the Act alleging that the respondent violated its duty of fair representation in failing to forward the grievor's complaint to arbitration.

2. The respondent trade union is party to a collective agreement with Dominion Glass Company Limited (hereinafter referred to as "the company") for a plant unit of employees at Bramalea. At all material times the grievor was a member of the bargaining unit employed by the company as a packager until she was discharged on January 7, 1975. Without detailing the extent and nature of the grievor's medical problems it appears that she was unable to attend to her job duties on a regular basis. The evidence indicates that she was absent from work for lengthy periods of time and when she attended she could not perform her regular job duties. On December 15, 1974, the grievor while at work fell and injured herself. On December 18, 1974, the grievor came to work but had to leave during the middle of her shift. The evidence indicates that her husband, Olaf, phoned the company nurse the next day to report the grievor's absence from work in accordance with the requirements of Article 9:10 of the collective agreement referred to herein. The company's notice of termination indicates that the reason for the discharge was the grievor's failure to comply with that requirement.

3. On January 8, 1975, the grievor contacted her union steward, Rita Burt, at her home and reported the discharge. Mrs. Burt that very evening telephoned the respondent's President, David Clarke, and provided him with the necessary information. Mr. Clarke indicated he would look into the complaint and upon completing his own investigation concluded that the grievor's complaint was legitimate. There is no dispute that upon reviewing the merits of the grievor's situation the respondent through its officers, namely, Mrs. Burt and Mr. Clarke resolved that the complaint ought to be processed through the grievance procedure provided under the terms of the collective agreement.

4. The evidence indicates that Mrs. Ercegovic experienced difficulties in contacting Mr. Clarke with respect to the disposition of her complaint. She complained that whenever an attempt was made to contact Mr. Clarke at work he never responded to her messages. Mrs. Burt was the vehicle through whom the grievor was to learn of the handling of her

complaint. Mrs. Burt indicated she had no difficulty in contacting Mr. Clarke because she was in possession of his unlisted home telephone number. Mrs. Burt testified that on a number of occasions she phoned Mr. Clarke to inquire about the grievor's complaint. Each time Mr. Clark indicated he was working on it. Mr. Clarke complained that he had tried on several occasions after completing his investigation to telephone Mrs. Ercegovic to arrange a meeting for the signing of a formal grievance. On each occasion his telephone call went unanswered. Indeed, he informed Mrs. Burt on one occasion of his difficulties in getting in touch with the grievor.

5. Ultimately a meeting was arranged at Mrs. Burt's home when a formal grievance was executed. By this time the respondent suspected upon being informed by its international representatives that the grievance was untimely. Upon filing the grievance the company replied by indicating that the respondent had not complied with the mandatory time limits required for the filing of a discharge grievance and refused to process the same. Notwithstanding the efforts of representatives of the respondent's parent international to persuade the company to waive its objections to the arbitrability of the issue Mrs. Ercegovic was denied a remedy pursuant to the relevant provisions of the collective agreement.

6. The collective agreement distinguishes between ordinary grievances and discharge grievances and provides different time limits for processing each through the various steps of the grievance procedure. In the case of discharge, a grievance may be filed directly at the third step provided it is filed within 5 days from notification by the company of the termination. Ordinary grievances initiated at the first step may be filed within 11 days of the occurrence of the alleged infraction. In the circumstances described herein it appears apparent from the evidence that both Mrs. Burt and Mr. Clarke treated the grievor's complaint as an ordinary grievance. Mrs. Burt initially stated that she had forewarned Mr. Clarke at the time of their first conversation of the need to exercise some dispatch. She admitted, however, that she did not address Mr. Clarke directly to the five day limitation period. Indeed, the evidence indicates that upon Mrs. Burt's own discharge her grievance was denied by the company for the same reason. The conclusion is therefore readily arrived at that at all material times neither the respondent's union steward nor its president were aware of the 5 day limitation period provided under the terms of the collective agreement for the filing of discharge grievances. Or, alternatively, it may also be inferred that the respondent's representatives at the relevant time were under the impression that eleven days was sufficient from the date of notification of the discharge to file a formal grievance. And, as a result, their failure to exercise the necessary dispatch in the filing of the grievor's written grievance may be attributable to this mistaken impression.

7. Counsel for the complainant submits that the respondent's conduct was "arbitrary" in that its representatives failed to address themselves to the grievor's complaint and process the same in accordance with its duty of fair representation. The grievor's representative conceded that the respondent conducted itself in good faith and without malice towards the grievor. He argued quite forcefully however that the mere failure of the respondent's representatives (especially Mr. Clarke, the president) to address themselves to the terms of the collective agreement should raise an irrefutable presumption of "arbitrariness" in connection with their treatment of the grievor's situation.

8. The Board is satisfied that the grievor's complaint was so mishandled by the respondent's representatives that it borders on a disgrace. It appears to this Board that one of

the main functions of trade union representation is the protection of employees from indiscriminate discharge. The purpose of the discharge provision of a collective agreement is to hold the employer accountable for an employee's termination on pain of review by a Board of Arbitration. The bargain concluded by that collective agreement is made between the employer and the trade union as the exclusive representative of employees. Because of the failure by elected officers of the respondent trade union in the circumstances of this case to take sufficient measure to read and comprehend the terms of the grievance procedure contained in that collective agreement the grievor has been denied a fundamental benefit underlying the very purpose of according the respondent the privilege of employee representation.

9. The Board nevertheless must conclude that the grievor has not made out a case in support of finding that the respondent through its representatives breached its duty of fair representation as defined under the terms of the Legislation. In surveying the evidence the board notes that Mr. Clarke was recently appointed to the position of President upon the resignation of the incumbent. He had no prior experience in dealing with discharge grievances and admitted to being unfamiliar with the appropriate practice in such matters. Mrs. Burt was equally unaware of those procedures and ironically was victimized by this ignorance in connection with the forwarding of her own discharge complaint through the grievance procedure. We are satisfied that when representatives of the respondent's parent international were informed of the situation the damage was already complete. Nevertheless those representatives in good faith did try to convince the company to waive its technical objection to the arbitrability of the grievor's complaint but were without success. We therefore cannot characterize the respondent's conduct as "arbitrary" having regard to the nature of shortcomings described herein with respect to the processing of the grievor's complaint. In this regard the Board's conclusion is in no manner to be interpreted as an apology or an excuse for the respondent's conduct but is intended solely to reflect the respondent's capacity to barely exceed the minimum standard required of the legislation in dealing with employees for whom the duty of fair representation is owed. The complaint is therefore dismissed.

0286-75U United Electrical, Radio and Machine Workers of America,
(Complainant) v. **DeVILBISS (CANADA) LIMITED** (Respondent).

BEFORE: D.D. Carter, Vice-Chairman and Board Members E. Boyer and F.W. Murray.

APPEARANCES: *R. Russell and G. Stevens for the complainant; D.J. McKillop, Q.C., and G.H. Williams for the respondent.*

DECISION OF D.D. CARTER, VICE-CHAIRMAN AND BOARD MEMBER F.W. MURRAY: September 15, 1975

1. This is a complaint under section 79 of the *Labour Relations Act* alleging that John Siviter was dealt with by the respondent contrary to the provisions of sections 56 and 58 of the *Labour Relations Act*. The complainant asks that Siviter be returned to his former job with compensation for lost earnings, seniority and all other rights.

2. Siviter commenced work for the respondent as a production machinist on September 3, 1974, his employment background indicating substantial experience as a machinist in both Canada and the United States. prior to his employment with the respondent, Siviter had been employed as a milling machine operator at Douglas Aircraft, working there for approximately 5 years until being laid-off. On September 23, 1974, Siviter was moved from the job of production machinist to the lower-rated job of machine operator.

3. In April of this year the complainant began to organize the employees of the respondent, the first union meeting being held on April 24. Siviter was one of the leaders in the union's organizing drive, being a member of the union organizing committee and the leader of the employees in the machine shop. Apparently Siviter had canvassed most of these employees about joining the union. Siviter testified that, after working hours on May 7, when he was signing up two employees in his car parked on the respondent's premises, his foreman, Jim Franklin, drove past in such a way as to indicate interest in what was going on inside the car, taking a wider swing than normal in order to observe the activity in the car.

4. Earl Ricketts, a fellow employee, testified that, on the following day at lunch, Siviter requested blank union cards from a fellow employee, and this might have been overheard by an employee from the production office. According to Ricketts, there was a fear among some employees that those active in the union organizing drive would be discharged. Ricketts further testified that, on May 9, the date of Siviter's discharge, he had been warned that, if he took any further time off for sickness, he would be replaced. Apparently Ricketts had been absent on Monday, four days earlier, because of sickness.

5. Siviter's discharge occurred on May 9, just before he finished his shift. Siviter testified that he was told by his foreman, Franklin, that he was being discharged for "a lot of scrap, low productivity and absenteeism". Siviter testified that he had not received any formal written warning about the quality of his work, nor had he received any written warning about his absenteeism. He also claimed that he had not produced an excessive amount of scrap and that his productivity was about average, being 75 or 80% of the quota established by the respondent.

6. A second incident involving Ricketts occurred on June 10. On the morning of that day, Ricketts had been distributing union leaflets at the plant entrance prior to starting time. Subsequently, he was called in for an interview with the plant manager, Bert Popp. Apparently Popp exhibited considerable agitation over Rickett's activity, threatening to discharge him if he was caught in any further union activity. Ricketts testified that Popp then added, "I should discharge you right now but you're not going to be around here anymore". Finally, Ricketts testified that the respondent permitted certain employees to hold an employee meeting in the plant cafeteria on June 11 in order to discuss ways of keeping the union out.

7. The respondent introduced a considerable amount of evidence relating to the work performance of Siviter. Franklin, Siviter's foreman, testified that Siviter was initially downgraded because of his inability to meet the production quota. Franklin testified that, even after the demotion, Siviter continued to fall below the standard, failing to produce the required quantity and producing work that was only fair in quality. According to Franklin, the matter of Siviter's work performance was discussed with him on several occasions. He further testified that, on the week prior to the discharge, Siviter was responsible on one oc-

casion for work that had to be reworked and on another occasion for work that had to be scrapped. In the case of the rework, Siviter was warned by Franklin that it should not happen again.

8. Respondent also introduced copies of the daily recapitulation of employee work records for the machine shop, running from the beginning of the year to the date of discharge. The applicant objected to the reception of these documents because of their hearsay nature and because they were merely copies of the original documents. The Board ruled that it would receive these documents, but that it would take into account the complainant's objection when assigning weight to them. After examining these documents, the Board determines that no weight can be given to them. The witness identifying the documents, Franklin, did not prepare them, but only received them once they were prepared. As a result, Franklin could only testify that this was a document that he received and, so far as he knew, the information on these sheets corresponded with his own knowledge of the work performance of the employees in the machine shop. A further problem with the sheets is that they do not supply sufficient information on which to compare the work performance of the employees in the machine shop. Although the sheets indicate whether an employee has reached the quota for the task assigned, the sheets do not indicate the relative difficulty of the tasks assigned. As a result, the sheets are not a reliable base on which the Board can judge the relative work performance of Siviter. In cases such as this, the best evidence concerning an employee's work performance is the direct testimony of persons familiar with that employee's work. In this case, the Board was impressed by the testimony of Siviter's immediate supervisor, Franklin, who indicated in a forthright and candid manner that he had never been satisfied with Siviter's work performance.

9. The decision to discharge Siviter occurred on May 8, resulting from a discussion between Franklin and Walter Oslund, the general foreman. Franklin testified that Oslund had noticed some damaged spray heads on Franklin's desk, scrap for which Siviter had been responsible. Oslund, upon noticing the scrap, suggested that Siviter be discharged and Franklin immediately concurred. Both Franklin and Oslund testified that Siviter was discharged because of low production and the high amount of scrap resulting from his work.

10. The question is whether these facts indicate that Siviter was discharged contrary to the provisions of the Act. If the reason, or one of the reasons, for Siviter's discharge was his union activity, then the discharge is illegal. This restriction upon employer conduct is clearly spelled out in section 58(a) of the Act, which prohibits an employer from refusing to continue to employ a person "because the person was or is a member of a trade union or was or is exercising any other rights under this Act". Although the rule is clear, the application of the rule is not free from difficulty, requiring the Board to ascertain from the facts the reason, or reasons, for discharge. Since these reasons are seldom apparent on the surface, the Board, in order to determine the matter, must perform the difficult task of drawing inferences from the circumstantial evidence surrounding the discharge.

11. The evidence establishes that Siviter's work for the respondent was unsatisfactory. Although his previous employment record suggests competence, the evidence indicates that, for whatever reason, Siviter's work for the respondent did not meet the level of competence that such a record would suggest. The fact that Siviter's work was unsatisfactory does not by itself exculpate the respondent. In the early stages of union activity, employees are particularly susceptible to the influence of employer conduct. The exercise of the power of

discharge by the employer at this time is a blunt reminder of the economic strength of the employer and, conversely, the economic vulnerability of the employees. A discharge at this time is bound to have a substantial impact upon employee attitudes towards the union organizing drive, in most cases having a destructive effect. The Board, therefore, does not determine whether an employer has just cause to discharge an employee, but determines the quite different issue of whether a cause of the discharge was the employee's union activity. See *Delhi Metal Products Limited*, [1974] O.L.R.B. Report 450. To take any other approach would be to allow anti-union conduct to masquerade as just cause.

12. In this case the following factors are relevant in our determination of whether there was any anti-union motive for the discharge: 1) the existence of a pattern of anti-union activity; 2) the extent of the respondent's knowledge of the existence of union activity and of the employee's involvement in that activity; 3) the manner in which the employee was discharged; 4) the credibility of the witnesses.

13. The existence of a pattern of anti-union activity occurring at or around the time of discharge is circumstantial evidence that will support an inference that the discharge was part of that pattern. If an employer exhibits an anti-union motive in the conduct of its affairs during a certain period, then all of its action during that period become suspect. On the other hand, if the discharge is an isolated incident occurring in the context of legitimate behaviour, it is more difficult to conclude that there existed an improper motive for the discharge.

14. The facts in this case do not appear to establish a pattern of anti-union behaviour at or around the time of discharge. Other than the discharge of Siviter, the only incident at that time that might be characterized as anti-union conduct was the reprimanding of Ricketts for absenteeism, an incident that might point to a tougher attitude being taken by the employer because of the presence of the union. In neither incident, however, did the respondent openly manifest an anti-union attitude. The incidents in June also fail to establish a pattern of anti-union conduct. These two incidents, occurring a month later, although demonstrating an anti-union attitude on the part of the respondent, are too far removed from the discharge in time to establish a pattern. The Board, therefore, concludes that the evidence does not establish a pattern of anti-union conduct by the respondent at or around the time of the discharge.

15. Knowledge by the employer of union activity and the employee's involvement in that activity is an important ingredient in determining the motive for a discharge. If an employer has no knowledge of union activity among its employees, which might occur in the early stages of an organizing drive, then the possibility of an anti-union motive would be remote. Conversely, if there is knowledge, and that knowledge manifests itself in an anti-union attitude, then there would be evidence upon which the Board could base an inference that the discharge was prompted by an anti-union animus. The inference would become even stronger if the discharged employee is extensively involved in union activity and this involvement is known by the employer.

16. In this case there is very little evidence pointing to knowledge on the part of the respondent. The incident in the parking lot might indicate an awareness of union activity on the part of management, but it does not do so conclusively. Franklin testified that he did not see any other employees in Siviter's car at that time. It is quite possible that Siviter read

too much into Franklin's action, being justifiably apprehensive about being observed while signing up union members. The incident on the following day at lunch is open to the same interpretation, pointing more to the fact that the employee's were concerned about the employer learning of their union activities than to actual employer knowledge of such activities. On the facts, we must conclude that it has not been established that the employer knew of the union activity within the plant and the extent of Siviter's participation in such activity.

17. The manner in which an employee is discharged may offer some clue as to the motive for the discharge. This does not mean that the Board determines whether the discharge is for just cause. Just as the existence of just cause does not offer a defence to employers, the lack of just cause does not establish a case for the employee. The issue is, in these cases, quite a different one – whether there exists any anti-union motive for the discharge. Anti-union motive, however, may be inferred from the manner in which an employee is discharged. If the manner in which the discharge occurs deviates from the normal pattern for such activity, then it is a possible inference that the deviation has some connection with the presence of union activity.

18. The complainant in this case argued that the respondent's failure to adhere to its written rules requiring progressive discipline, where there was a failure to maintain either quality or quantity of production, pointed to an anti-union motive for the discharge. There was no evidence, however, that these rules were normally applied and, in fact, the only evidence on the matter was that of Franklin who testified that the rules regarding progressive discipline were not followed as a general practice. The facts, although indicating that the respondent may have treated Siviter in arbitrary fashion, do not indicate that the treatment was any more arbitrary because of his union activity.

19. The Board's reliance upon circumstantial evidence in these cases makes the credibility of witnesses an important factor. The manner in which the witnesses testify can often assist the Board in reading between the lines. In this case we found that Siviter was less than frank under cross-examination, especially in respect of his work performance. This lack of frankness was taken into account by us in arriving at our decision.

20. On the facts in this case we conclude that Siviter was not discharged for his union activity. Although the conduct of the respondent is not above suspicion, the facts as presented to us do not supply the basis for an inference that the discharge was because of Siviter's participation in union activities.

21. The complaint is dismissed.

DECISION OF BOARD MEMBER E. BOYER

1. I dissent.

2. Having regard to all the evidence in this matter, I find that John Siviter had an excellent work record over the past twenty-five years. Further, I find that Siviter's testimony regarding his work record while employed with the Respondent to have been given in a very frank manner. For these reasons, I would reject the explanations given by the Respondent for the discharge.

3. Charges of dismissal for union activity raise difficult questions, in that it is the respondent employer who has knowledge of the reasons behind the dismissal. With respect to this difficulty, I would quote from the dissent of P.J. O'Keefe in *Long Manufacturing Division, Borg Warren (Canada) Ltd.*, File No. 7503-74-U, June 3, 1975 (unreported to date):

In complaints of this kind heavy reliance must be placed on circumstantial evidence. It would be an impossible onus to place on a complainant to establish by direct evidence that an employee was discharged for his union involvement. In all cases of this kind there is an allegation of discharge for union activity by the complainant and a denial by a respondent company. The true reasons for the discharge of an employee lie exclusively within the knowledge or means of knowledge of a respondent company. This Board from its long experience is well aware that we have not as yet been fortunate enough to get a confession of guilt by a respondent company when accused of discharging an employee because of his union activity. For this reason the Board's guidelines and reasoning in such cases as *National Automatic Vending Co. Ltd.* (supra) *Metropolitan Meat Packers Ltd.* (1962) 62 CLLC Para 16,230; *Fruehauf trailer Company Limited* (1973) OLRB Rep. October 547; and *Disposal Services Company* (1965) OLRB Rep. January 529, have evolved to assist the Board in its deliberations. There are some clear cut cases, as in the instant case, where the complainant has well established its case and has caused the onus to shift to the respondent. When that onus is not discharged by a respondent and when the defence as in the instant case falls far short of its onus and in fact raises serious questions of credibility then such a defence must be rejected.

4. In result, then, I would find that Siviter was discharged for his union activities. I would order the reinstatement of Siviter, and I would further order the respondent to pay full compensation to Siviter for wages and benefits lost as a result of such illegal activities.

7330-74-R Graduate Assistant's Association, (Applicant) v. York University, (Respondent).

BEFORE: Frank V. Boscariol, Vice-Chairman, and Board Members J. D. Bell and E. Boyer.

APPEARANCES: I. Springate, D. Moeser and M. Golden for the applicant; D. F. Hersey and D. Mitchell for the respondent.

DECISION OF FRANK V. BOSCARIOL, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL: September 16, 1975.

1. The name: "Board of Governors of York University" appearing in the style of cause of this application as the name of the respondent is amended to read: "York University".

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

3. Pursuant to the initial decision of the Board dated March 18, 1975, the Board directed that a pre-hearing representation vote be taken in this matter in the voting constituency as defined therein. This vote was conducted on March 31, and April 1 through to April 3, 1975, at which time all of the ballots were segregated and not counted pending the further direction of the Board. On April 17, 1975, we directed the Registrar to list this matter for hearing to enable the Board to entertain the evidence and representations of the parties concerning the appropriateness of the resultant bargaining unit and any other outstanding issues.

4. At the initial hearing of this matter held on May 21, 1975, the parties requested that prior to proceeding with any other outstanding issues arising during the course of this application, the Board render a decision concerning the preliminary issue as to whether certain full time graduate students of York University retained in the capacity of Graduate Assistants and Teaching Assistant qualify as employees for purposes of The Labour Relations Act. This preliminary issue also extends to those York University graduate students retained at Atkinson College in the positions of Tutors and Course Directors. It is the submission of the respondent that the graduate students who receive the "Assistantship" funds do not qualify as employees within the meaning of the Act and that they are therefore in no different position from those students in receipt of scholarship, bursary or loan funds from the University, save for the fact that they are asked to perform services of questionable use to the University or to the faculty member to which they have been assigned. On the other hand, the applicant maintains that such funds in effect constitute "wages" in return for work essentially unrelated to the graduate student's academic studies and which is performed pursuant to a written contract of employment. While the respondent suggested that the work as performed by these graduate students was of limited but mutual value to both the University and to the graduate student concerned, it was the applicant's contention that the performance of these services provided a real contribution to the University in furthering its primary functions which were defined in terms of Teaching, Research and the dissemination of that Research to the public.

5. The evidence discloses that pursuant to the Ontario Operating Formula Manual (Exhibit #25), the graduate students in question at all relevant times were entitled to a maximum allotment of \$2400 per annum and that the time spent at their work with the University in this regard could not exceed an average of ten hours per week. However, a ceiling of \$5,300 was imposed upon the student receiving monies from all sources including such matters as scholarship funds or other awards. It is clear that if for any reason, the graduate student was required to withdraw from his course of studies, payment of the government-supported Assistantship monies would cease.

6. The testimony of Douglas Hawkings is to the effect that subsequent to obtaining his Bachelor of Arts degree in Sociology, he enrolled as a full time student in the Faculty of Environmental Studies at York and while pursuing his academic endeavours in this regard, he also worked as a Teaching Assistant in the Social Science Division. He first became aware of this position through an advertisement in a student newspaper and following an initial interview and the submission of his resumé, he formally accepted the University's offer of an appointment. By letter dated June 7, 1974, Hawkings was further advised as follows:

“ The University Administration has requested that we send all Part-time Instructors and Teaching Assistants the following addendum to your letter of appointment.

‘ It is understood that your salary of \$1600 for the period of September 1, 1974 to April 30, 1975 provides for full payment of any statutory holiday, vacation, overtime or termination pay, or other benefits payable by Statute, Custom or policy.”

7. Hawkings further testified that his main function as a Teaching Assistant was to lead two tutorial groups comprised of some fifteen to twenty students and that his duties in this respect were to guide the discussion around certain issues based upon the professor's lectures. (See also “Statement of Procedures” filed as Exhibit #6). In addition to the ten hours per week spent in relation to his teaching duties, which included the attendance at the professor's lectures and keeping notes with respect to the progress of the students in the tutorials, he also assisted in the marking of their examination papers. Hawkings further testified that his teaching activities were rendered on a purely voluntary basis. As such, these activities were independent and unrelated to his enrollment as a full time student in Environmental Studies. He concluded his examination-in-chief by stating that without the direct aid of the four Teaching Assistants assigned to the professor, it would have been virtually impossible for that professor to effectively teach the 110 undergraduate students concerned.

8. Professor Buchbinder, Associate Professor of Social Science and departmental chairman at Atkinson College, gave evidence with respect to the duties assigned to Tutors and Course Directors at that institution which administers evening undergraduate courses to adults. His testimony with respect to those York students engaged in these classifications essentially parallels that elicited from Hawkings with respect to his duties as a Teaching Assistant at York. In cross-examination, he indicated that there was no attempt to integrate the teaching functions performed at Atkinson with the individual's graduate program at York. When asked if these persons accepted these positions in order to further their educational pursuits, he indicated that he hoped it would be a learning experience for them, but that nevertheless, they were primarily “there for the money”.

9. The testimony of Robin Endres, a doctoral candidate in the English department at York, not only substantiates but, in our opinion, surpasses Hawking's evidence concerning the extent of the Teaching Assistants' duties. While Hawkings testified that, subject to review by the professor, he was in effect responsible for forty per cent of the undergraduate student's grade, Miss Endres stated that she was (aside from the remuneration aspects) in no different position from any of the full time faculty members, and that as such, she was responsible for one hundred per cent of the grades assigned to the students in her section. Further, she indicated to the Board that at the conclusion of giving her testimony before us, she would be proceeding to Ryerson Institute where she has been engaged to teach an English course upon essentially similar terms to those associated with her teaching activities at York.

10. We shall now turn to the evidence regarding the duties performed by those persons classified by the respondent as Graduate Assistants. The testimony of Gale Teixeira, a doctoral student in Political Science at York, is to the effect that (and not unlike the proce-

dure utilized with Hawkings – see Paragraph #5 herein) she formally accepted the University's offer of a Graduate Research Assistantship. The assistantship was valued at \$2400 and stipulated that it was offered in return for a weekly commitment of time assisting a faculty member. She testified that her only work consisted in helping a professor to prepare a publication concerning "Party Politics in Guyana". Most of her time in this endeavour was spent in normal research activities and in the preparation of the bibliography to that publication.

11. A review of the testimony of Jack Hill, a graduate student enrolled in the Faculty of Environmental Studies, leads us to the conclusion that his work was essentially of a mechanical nature consisting in the main of such chores as zeroxing, collating and distributing various written articles to the students concerned. Mr. Reed, Dean of the Faculty of Graduate Studies of York, during the course of his testimony, was asked to comment upon Hill's duties. It was Dean Reed's opinion that Hill's assignment in this regard depicted a situation in which the University went desparately out of its way to find a graduate student a job which could have been routinely performed by the secretarial support staff at a drastically lower cost. Dean Reed calculated Hill's resultant pay scale at ten dollars per hour. In this regard, Dean Reed characterized these government support funds given under the guise of Graduate Assistantships, as more in the nature of a bursary rather than as payment in exchange for actual work performed during the course of employment. Upon re-examination, he indicated that the University had adopted this device in order to be in a position to legitimately claim the \$2400 government stipend on behalf of the graduate student.

12. Mr. Sydney Eisen, Dean of the Faculty of Arts at York, stated that the duties of the Graduate Assistant are much more loosely defined than those of his senior counterpart, the Teaching Assistant, and that in some instances, the former are simply assigned to a member of the faculty and perform very little work in this regard. In his own case, Dean Eisen testified that he had occasion to retain three Graduate Assistants to work on a bibliography for use by the undergraduate students in one of his courses. Despite the fact that it became apparent that one of these assistants was making no contribution to the bibliography, Dean Eisen stated that "there was not much I could do as his degree came first – there was no point in firing him." Accordingly, the assistant continued to receive, throughout the school term, all of the monies that the University had originally agreed to pay him. Dean Eisen further stated that if no Graduate Assistants were available, he would not have hired anyone to fill the "vacancies". In explaining the procedures necessary to appoint a Graduate Assistant, he stated that the monies had already been set aside and that in this sense there was "\$2400 guarantee". The question as to what work the graduate student will be assigned is only obtained at a later date. He contrasted this situation to the case of the need for Teaching Assistants with respect to their activities associated with the teaching of tutorials and the marking of examination papers. If no graduate students were available in this regard, he stated that the University would be compelled to hire "outsiders".

13. Having carefully reviewed the totality of the evidence as adduced and which was extensive, we find that there are significant differences in the duties of the Teaching Assistant vis-a-vis the Graduate Assistant. In the former case, we are satisfied that the work as performed by the graduate students engaged in this classification forms a necessary and essential element in the teaching and the administration of the academic courses as conducted by the respondent University. Such work by its very nature is indispensable and of direct and immediate benefit to the employer and generally forms no specific part of the graduate student's own academic program in which he is simultaneously enrolled. On the other hand,

the tasks performed by the Graduate Assistant, we find, are of a supernumerary or non-essential nature. In contrast to the normal employment relationship where the individual is hired to perform a generally pre-determined work task, the "jobs" are created only after the Graduate Assistants are appointed. Moreover, the superfluousness of these tasks is further enhanced when one considers that any vacancies in such classifications would, in the absence of these students, generally not be filled. In all of the circumstances, the Board is therefore drawn to the irresistible conclusion that the engagement of Graduate Assistants by the University involves essentially a "make-work" scheme primarily designed to qualify these students for government-support monies in an effort to provide them with some financial assistance while pursuing their particular post-graduate course of studies. (In this regard, we find their duties somewhat analogous to the duties of the student practical nurses as set out in the recent decision of the British Columbia Labour Relations Board in the *Cranbrook and District Hospital and Selkirk College* case, 1975 Canadian Labour Relations Boards Reports 42, where at page 57, the Board concluded that the limited benefit accruing to the hospital from these alleged employee "is of an incidental by-product of a program designed and administered with quite a different objective.")

14. The Ontario Labour Relations Act provides no specific definition of the term "employee". In the *Loblaws Groceries Co. Ltd.* case 66 CLLC ¶16,078, p. 878, the Board at page 887 stated as follows:

"The relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope of the duty undertaken. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method or remuneration, and the power of controlling and dismissing the worker, although none of these factors is by itself conclusive. (Hatsbury's Laws of England, 3rd, ed., vol. 25, pp. 447-448, emphasis added).

Whether any relation is that of a master and servant is entirely a question of fact in each individual case, depending upon the contractual connection established between the parties by the terms of the agreement creating it, and the law is not concerned with the terminology used by the parties but only with the nature of the relation which the parties intended, or in the absence of clearly expressed intention, must be deemed to have intended to create; and further than this, ... the law attaches to parties the relation of master and servant in many cases where the parties had not intention of creating it, or where they expressly stated a contrary intention, or where for other purposes no such relation will be deemed to exist ...

Herein lies the inherent difficulty of giving an exhaustive definition or summary of the essentials of the relation of master and servant. Such a relation has two distinct aspects, the one is intrinsic, internal, or domestic, the other is intrinsic, external, or extraneous to the parties composing it. As between the parties, the alleged master and servant, nothing is added or taken away from their contractual right by the fact that they

are legally master and servant or that they are something less or more; everything is governed by the obligations they expressly or impliedly undertake when entering upon the relation in question. Where the terms of any agreement ... are silent on any matter it may become a question of great importance to arrive at the decision whether the relation was that of master and servant. A man may be liable for the contracts or wrongful acts of another although the latter is not his servant, because for the purposes of the case the law assumes the latter to be the former's servant. However, it is probably more correct to say that the liability attaches not because of any imputed service but for precisely the same reason that the law attaches liability to a master, which is because the servant is deemed to have authority to act on his master's behalf, and such authority may exist although the parties are not master and servant. The contract of service, does not create the master's liability for the servant's acts, but is merely a circumstance proving the authority of the servant to act on the master's behalf and from which authority the master's liability arises. This explains why a master is frequently held liable for injuries sustained by third parties through the acts of his servant, although the acts in question were expressly forbidden by the master ...

(Batt, *Law of Master and Servant* pp. 2-3, emphasis added).

(See further on the control test the following: *Re Lunnenberg Sea Products: Re Swicker*, [1947] 3 D.L.R. 195; *The King v. Labour Relations Board*, (1951) CCH Canadian Labour Law Reporter, Transfer Binder, ¶15,017 [51 CLLC ¶15,017]; *Performing Right Society, Ltd. v. Mitchell and Booker (Palais de Danse) Ltd.*, [1924] 1 K.B. 762; 93 L.J. K.B. 306; *Eisert v. Martin No. 122 and Silverwood No. 123*, (1955) 18 W.W.R. 314, 1 D.L.R. (2d) 479 (Sask. C.A.); *Keshen v. Lipsky and Co.*, [1956] O.W.N. 277; *Armstrong v. A.G. of New Brunswick*, (1956) 5 D.L.R. (2d) 606 (N.B.C.A.); *Elliot and Sons Ltd. v. Preston and Sons Ltd. and Bartholomew*, [1957] O.W.N. 205; *Marine Pipeline and Dredging Ltd. v. Can. Fina Oil Ltd.*, (1964) 46 D.L.R. (2d) 495 (Albta. C.A.); *Italo-Canadian Sports Group v. Winer*, [1962] O.W.N. 218).

While the terms "employee" and "employer" as contained in the relevant American statutes are broadly defined (see below), it is of interest to note the tests for determining the existence of an employee-employer relationship applied in the following American authorities: –

In determining the true nature of a worker-employer relationship, the following factors should be taken into consideration—the right to hire and discharge; the permanence of the relationship; whether the work is part of the employer's regular business; the extent of control which, by agreement, the employer may exercise over the details of the work; the method and determination of the amount of compensation; the skill required in the particular occupation; who furnishes the tools, materials and place of work, and who has control of the premises where work is

done; whether the person doing the work is engaged in an independent business or enterprise and particularly whether he stands to make a profit on the work of those working under him; and the party's belief as to the nature of the relationship created. No one factor is controlling; nor is the list complete. The character of the relationship is to be appraised by the presence or absence of no single evidentiary factor, but by an over all view.

(See *Kansas City Star Co.*, (1948) 76 N.L.R.B. 3B4; *M. Steinberg & Co.* 78 N.L.R.B. 211).

If the incidents of a particular service relationship are such as to permit collective bargaining between those who receive services and those who render them, for changes in the terms and conditions of performing the service, the statutory objectives are capable of achievement and the relation may then be held to be one of employer and employee.

(See *Armour & Co.*, (1945) 63 N.L.R.B. 1200)."

15. Having therefore carefully reviewed the totality of the evidence and applying the principles as set out above, the Board finds that the graduate students of York University employed as Teaching Assistants at York and those employed as Tutors and Course Directors at Atkinson College, are employees for purposes of the Act. We further find, that those graduate students classified by the respondent University as Graduate Assistants, do not qualify as employees within the meaning of the said Act.

16. The Registrar is accordingly directed to list this matter for continuation of hearing regarding all outstanding issues.

DECISION OF BOARD MEMBER E. BOYER.

1. I concur with the majority in finding that the graduate students of York University employed as Teaching Assistants at York and those employed as Tutors and Course Directors at Atkinson College, are employees for purposes of the Act.

2. However, having carefully reviewed all of the evidence I would have concluded that the graduate students classified by the respondent as Graduate Assistants also qualify as employees within the meaning of the said Act.

6911-74-JD Campeau Corporation, (Complainant) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada, and Local 506 Labourers' International Union of North America, (Respondents).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members F. W. Murray and P. J. O'Keeffe.

DECISION OF THE BOARD: September 17, 1975

1. In a decision dated November 25, 1974, the Board made the following interim order with regard to the complaint made by the complainant in this matter:

The complainant Campeau Corporation shall assign the work involved in bush-hammering performed by the complainant at the Harbour Castle Hotel project on the Toronto Harbour Waterfront at the foot of Bay Street in the Municipality of Metropolitan Toronto to its employees who are members of Local 506 of the Labourers' International Union of North America.

This order shall become effective forthwith and shall remain in effect until such time as the Board issues a further direction.

2. Pursuant to section 81(10) of The Labour Relations Act, on November 26, 1974, the Board filed a copy of the above interim order in the office of the Registrar of the Supreme Court.

3. In a letter dated September 15, 1975, the complainant has advised the Board that it intends to withdraw its application. For the Board to grant the complainant's request at this stage of the proceedings obviously would preclude any determination by the Board on the merits of the complaint. In these circumstances, the Board is of the opinion that its consent to the complainant's request should necessarily be conditional upon a revocation by the Board of its interim order in this matter.

4. The Board hereby revokes its interim order in this matter dated November 25, 1975.

5. The complaint is withdrawn by leave of the Board.

0622-75-R Ian Arsenault on behalf of a Group of Employees, (Applicant) v. Canadian Textile and Chemical Union, (Respondent) v. **Artistic Woodwork Co. Limited**, (Intervener).

BEFORE: George S.P. Ferguson, Q.C., Vice Chairman, and Board Members H. Simon and J.E.C. Robinson, Q.C.

APPEARANCES: *Ernest Rovet, Ian Arsenault and Patricia Forrest for the applicant; Frank Park and John Lang for the respondent; W.J. McNaughton, B.R. Baldwin and S.J. Vanzyl for the intervener.*

DECISION OF THE BOARD: September 10, 1975

1. This is an application under section 49 of the Labour Relations Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. The applicant is an employee of the intervener and there is a collective agreement between the applicant and the intervener, which expired on August 20, 1975.

3. The Board finds that the application is timely. No objections were raised with respect to timeliness.

4. On the date of the application there were 119 employees in the bargaining unit covered by the collective agreement between the applicant and the intervener. The bargaining unit is described as follows:

“all employees of Artistic Woodwork Co. Limited in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period.”

5. The documentary evidence in support of the application consists of five separate typewritten documents containing a total number of 84 signatures. Seventy-seven of the persons who have signed these documents were in the bargaining unit on the date of the application. Each of the signatures found on the documents is witnessed by one or two individuals; being either the applicant or Mr. Reginald Gilbert, another employee, who was actively engaged in support of the application. The typewritten heading on each document in support of the application clearly specify the wishes of those employees who signed the document to petition to the Board for termination of the bargaining rights of the respondent. Each of the five petitions in support of the application is in a different language. It is noted that there is a date inserted beside the name of the witness to each signature. The majority of the signatures on the petitions have the designated date of either July 1st, 1975, or July 2nd, 1975.

6. At the hearing conducted on August 19, 1975, substantial evidence was adduced and full opportunity was given to the representatives of the parties to deal with all aspects of this matter. A searching examination dealt with all aspects with respect to the manner in

which the documentary evidence in support of the application was originated and signed. The Board heard evidence from the applicant, as well as from Mr. Reginald Gilbert who, along with the applicant obtained signatures on the petitions filed.

7. The evidence presents certain difficult areas with respect to the location where the petitions in support of the application were signed and with respect to the recognized opposition to the respondent union by the applicant, since a strike occurred in 1973. There is a conflict in the evidence adduced by the witnesses called by the respondent with respect to the location and type of activities carried out by the applicant in having this documentary evidence signed.

8. The evidence is not sufficiently decisive. We are unable to find that the circumstantial evidence is consistent with the conclusion that the documents in support of the application do not constitute a voluntary expression of the employees' desires. The mere knowledge by the intervener of the continued opposition by the applicant to the respondent union including his activities conducted outside the company's plant is not sufficient to cast sufficient doubt on the validity of the applicant's evidence. The Board has carefully reviewed all of the factors considered in this type of application as outlined in the case involving *Laundry Dry Cleaning & Dye House Workers v. Parker's Works & Cleaners Limited*, OLRB., M.R. December 1974, p. 859. The factors weighed in that case have been taken into consideration here, inasmuch as the respondent submits that an atmosphere existed with respect to the long term recognized opposition of the applicant to the respondent from which one could infer that the documentary evidence in support of the application is the creation of management.

9. On the totality of the evidence, we find that there is no evidence which supports there having been any direct or indirect pressure from management on employees in the bargaining unit to sign the petitions or that management representatives discussed these petitions with any person in the bargaining unit or rendered financial support to the application. Under these circumstances the Board concludes that the applicant and the other employee associated with him acted independently. The first hand evidence given by these two individuals outweighs the conflict of circumstantial evidence adduced by the respondent.

10. The Board is satisfied on the basis of all evidence before it that not less than fifty per cent of the employees of Artistic Woodwork Co. Limited, Toronto, in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on August 7, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said Act.

11. The Board directs that a representation vote be taken of the employees of Artistic Woodwork Co. Limited, Toronto. Those eligible to vote are all employees of Artistic Woodwork Co. Limited in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

12. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Artistic Woodwork Co. Limited, Toronto.

13. The matter is referred to the Registrar.

0735-75-R Textile Workers Union of America, AFL-CIO-CLC, (Applicant) v. Cornwall Spinners Limited, (Respondent).

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members E. Boyer and J.E.C. Robinson, Q.C.

APPEARANCES: *Douglas J. Wray, Charles Clark and Maurice Robillard for the applicant; Roy C. Filion and Harry Freedman for the respondent.*

DECISION OF THE BOARD: September 10, 1975

1. The respondent submits that this application for certification is premature based on the fact that at the time of the application there was not a substantial and representative segment of the work force in the proposed bargaining unit.

2. Construction of the plant now occupied by the respondent in Cornwall started in the Fall of 1974. Employees were first hired in February of 1975 for the purpose of installation work but only 11 employees were hired prior to June, and by the end of June 1975 there were 25 employees on the work force' on the date of the application for certification there were 67 employees in the proposed bargaining unit and on the date of the hearing the work force had increased to 76 employees. Production commenced at the end of June and at the present time while the company is operating on three shifts, the two night shifts are manned by a total of 16 employees. The majority of employees work on the day shift. The respondent adduced evidence which confirm a definite and planned build up in the number of employees in the bargaining unit up to 151 by June of 1976. This build up will be accomplished by hiring 8 new employees each month. The existing facilities and equipment will be sufficient to look after the employees of approximately 136 employees because some new equipment must be ordered to permit the hiring of additional employees to make up the total build up to 151 employees.

3. All of the classifications which would normally be included in the bargaining unit are now employed at the respondent's plant but it would appear that the build up and the total number of employees is not subject to normal contingencies pertaining to sales volume, material delivery, or other variables. On the date of the application 65 of the employees in the proposed bargaining unit were members of the applicant and therefore even in the advent of a reasonable degree of build up, the applicant would continue to enjoy support from a substantial majority of employees in the bargaining unit.

4. Having carefully reviewed all of the circumstances of this case and having taken into account the factors as set out in the *B.F. Gooderich Canada* case, September 1970

OLRB. M.R., 655 and in the cases as cited therein we are satisfied that the present employees constitute a substantial and representative segment of the work force. Therefore, the Board is not prepared to postpone disposition of this matter as suggested by the respondent.

5. The Board finds that all employees of the respondent at Cornwall, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, shipper-receiver, store keeper, laboratory staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

6. It is noted that the exclusions from the bargaining unit defined above are in accordance with the agreement of the parties. There is a dispute with respect to the inclusion in or exclusion from the bargaining unit of maintenance staff. The Board finds that maintenance staff are included in the bargaining unit.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 18, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will issue to the applicant.

0674-75-R The Association of Professors of the University of Ottawa, (Applicant) v. **University of Ottawa**, (Respondent) v. Canadian Union of Public Employees, (Intervener).

BEFORE: T.E. Armstrong, Q.C. Chairman, and Board Members O. Hodges and J.E.C. Robinson, Q.C.

APPEARANCES: *J. Sack, A. Sarrazin, J. Cowan and L. McCaughey for the applicant; Pierre-Yves Boucher, T. Lacombe and R. Robitaille for the respondent; S.R. Hennessy and H. Brown for the intervener.*

DECISION OF THE BOARD: September 10, 1975

1. At the outset of this application for certification, the applicant was required to prove its status as a trade union as defined in section 1(1) (n) of The Labour Relations Act. The applicant adduced evidence that the Association of Professors of the University of Ottawa had come into being in the mid-1950's and filed with the Board a series of Constitutions and By-Laws, the first dated 1957 and the final amending document dated April 24, 1975. Mr. Raymond Vaillancourt, a professor of psychology employed by the respondent and a member of the Association, testified that the Association was an organization representing the respondent's full-time academic staff and that it had amongst its purposes the

improvement of the conditions of employment of the teaching staff, including salaries, fringe benefits, insurance, sabbatical leave and related matters. He testified that the Association had an established procedure for admitting persons into membership and that members paid dues, as fixed by the Association from time to time.

He also testified that the Association had officers and that initially he had served on the Association's General Council and had later become its treasurer. He stated that since its creation in the mid-1950's the Association had continued in operation without interruption and that its organization and aims had been substantially similar over the years. The various constitutional amendments referred to in the documents filed had, according to Mr. Vaillancourt, been approved and accepted by majority vote of the membership at large. Mr. Boucher for the respondent advised the Board that he was not raising any objections as to the status of the Association.

2. It must be said that the evidence concerning the initial adoption of a constitution is not as full and complete as it might have been. For example, while Professor Vaillancourt testified that the 1957 constitution was the original constitution of the organization, no detailed evidence was given as to the manner, or even the specific date, of its adoption. However, the uncontradicted evidence was that the original 1957 documents was amended, by the majority vote of the membership at large, on four subsequent occasions: March 17, 1964, March 23, 1972, January 28, 1975 and April 24, 1975. Moreover, all of the documents subsequent to the one bearing the handwritten notation "1957 Constitution" bear the notation "adopted March 17, 1964". It would appear, therefore, that a 1964 constitution (complete, and fundamentally different in content from the 1957 document) was adopted on March 17, 1964. However, even if the notation is insufficient to establish adoption on that latter date, we have the evidence that each of the subsequent amendments was accepted by a majority vote of the membership at large. The adoption of such amendments, and the continued and uninterrupted operation of the organization under the constitution, as amended, is consistent with the finding that the applicant had, at the time of the application, a constitution containing all of the essential ingredients of an "organization", i.e., objects (including the securing of "adequate conditions of employment and tenure"), officers, membership qualifications, fees, provision for meetings, amending procedures, etc. As to the significance of subsequent acts of ratification in curing or clarifying matters of status, reference may be made to *Gilbarco Canada Ltd. (1971) OLRB Rep. 155*. Accordingly, for all of the above reasons, we find the applicant is a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*.

3. The bargaining unit proposed by the applicant in its formal application differed in almost every material respect from the unit proposed by the respondent in its reply. However, following lengthy discussions counsel advised the Board that the area of dispute had been narrowed and that subject to certain specific matters of continuing disagreement (dealt with in detail in paragraphs 4, 5 and 6 below) the applicant and the respondent had agreed to the following bargaining unit:

"All full-time academic staff employed by the respondent in the City of Ottawa in the Regional Municipality of Ottawa-Carleton and all full-time academic staff to whom at least 50% of the salary at the university is paid by the respondent, save and except members of the Board of Governors, Rector, Vice-Rectors, Assistant vice-Rectors, Secretary to

the University, Deans, Director of the Institute for International Co-operation and/or persons holding acting appointments and so acting in the above positions, all full-time academic staff engaged in the practice of medicine in the course of clinical teaching of medicine, members of the full-time academic staff employed on a full-time basis in a position outside the bargaining unit.

Clarity Notes

'All full-time academic staff' shall mean such members of the academic staff appointed with a 50% or more employment status with the respondent and holding a rank at present described as lecturer, assistant professor, associate professor or full professor or language professor or persons holding essentially comparable ranks.

The unit shall include Medical Research Council Associates, but shall not include visiting professors (i.e., those professors appointed as such in accordance with present practice only and who are employed for a period of two years or less and beyond that period only with the concurrence of the A.P.U.O.), one incumbent Professor of Biochemistry paid in part by M.C.H.F.H. Research Fund.

Subject to the agreement of the parties with respect to professional librarians."

4. The final reference to the professional librarians relates to an agreement reached by the applicant, the respondent and the intervener, Canadian Union of Public Employees, in File No. 0632-75-R. The substance of that agreement is that professional librarians are to be given the opportunity to decide whether they wish to be represented by the intervener in a separate unit of professional librarians or whether they wish to be represented by the applicant in a university-wide unit of academic staff. That determination will be made in a representation vote to be held in the near future pursuant to the agreement. If the professional librarians vote in favour of a university-wide unit, the status of certain disputed library employees will have to be determined in this application. These categories, which the applicant claims should be included in the proposed unit and which the respondent wishes excluded, are: Associate Librarian, Directors of Department Libraries, Co-ordinator of Planning and Research, and Library Department Heads.

5. It bears emphasizing that the above-described bargaining unit was fashioned by the parties themselves. While the Board has the statutory obligation to determine the appropriate unit in every application for certification, we are generally disposed to accept the agreement of the parties as the most reliable indicium of appropriateness, unless of course we are of the view that the agreed unit is patently irrational or unworkable: see *The St. Catharines Standard Limited* case, June 13, 1975, Board File 7443-74-R. In the instant case, we are prepared to accept the agreement of the parties. In so doing we need make no finding as to whether a unit of professional librarians, by themselves, would, in the absence of agreement of the parties, constitute a unit of employees appropriate for collective bargaining.

6. Subsequent to the hearing, the parties reported to the Board's Labour Relations Officer, Mr. J.A. MacDonald, that the following additional classifications are in dispute: Department Chairmen (37), Vice-Deans (8), Associate Dean (1), Director of orientation Centre (1), Director of Department of Language Training (1), Director of Hospital Administration (1) and Director of Child Study Centre (1). It will be noted that none of the disputed classifications has been excluded from the unit description set out in paragraph 3 hereof. The parties agree, however, that once the Board has determined the status of the persons within the disputed classifications, the unit agreed upon will be amended in accordance with the Board's findings. It was also agreed that a Labour Relations Officer should be appointed to inquire into and to report to the Board on the duties and responsibilities of all classifications still in dispute.

Accordingly, the Board appoints Mr. J.A. MacDonald, Labour Relations Officer, to inquire into and report to the Board on the duties and responsibilities of Department Chairmen, Vice-Deans, Associate Dean, Director of orientation Centre, Director of Department of Language Training, Director of Hospital Administration, Director of Child Study Centre, Associate Librarian, Directors of Departmental Libraries, the Co-ordinator of Planning and Research and Library Department Heads.

7. As a result of the agreements reached, the Labour Relations Officer was provided with amended lists of employees to which the applicant and respondent had agreed. It will be appreciated that a final membership count must await the determination of the status of the persons within the disputed classifications of whom there are 65 in all. However, it is now possible to conclude that our determination on the disputed classifications cannot, in any circumstances, affect the applicant's right to outright certification. There are a number of potential combinations: for example, if all of the disputed classifications are excluded from the bargaining unit, the applicant has valid membership evidence for 432 employees out of a unit of 677, or 63.8%; on the other hand, if all disputed categories are included, the applicant's percentage membership support is 62%. The Board has calculated all intermediate possibilities and has satisfied itself that, on the basis of all the evidence before it, more than 55 per cent of the employees of the respondent in the bargaining unit (however it is described) at the time the application was made were members of the applicant on August 7, 1975, the terminal date for this application and the date which the Board determines, under section 92(2) (j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. At the conclusion of the hearing, the applicant requested that the Board exercise its power under section 6(1a) of the Act and certify the applicant as the bargaining agent, pending the final resolution of the composition of the bargaining unit. The applicant pointed out that the inquiry into the disputed categories could be protracted and that the granting of an interim certificate would fulfil the legislative intent reflected in the new section: namely, to permit the parties to proceed with those aspects of bargaining not dependent upon the final resolution of the status of the persons with the disputed categories. Counsel for the respondent did not strenuously object to the granting of certification pursuant to section 6(1a) of the Act.

He pointed out, however, that, if certification should issue immediately, the respondent would be faced with certain problems at the initial stages of bargaining. For example, he pointed out that, until the status of Departmental Chairman is determined, the respondent

might have difficulty in determining the composition of its bargaining committee. Moreover, he pointed out that the bargaining committee would need advice on various matters and the extent to which the bargaining committee could communicate with Department Chairmen on matters pertaining to bargaining would ultimately depend upon their inclusion in or exclusion from the unit.

9. It may well be that problems of the sort suggested by the respondent will to some indeterminate extent restrict or inhibit bargaining. However, none of the problems to which the respondent has alluded are, in our view, insuperable barriers to the commencement of bargaining and it cannot therefore be said that no useful purpose is to be served by granting interim certification. Accordingly, we are prepared to grant the applicant's request, pursuant to the provisions of section 6(1a) of the Act.

10. Since this is the first case in which certification has issued under section 6(1a) of the Act, it may be useful to set out the procedure which the Board deems appropriate in applications of this sort. Any certification at this stage must, obviously, exclude all disputed categories. It is equally obvious that their exclusion is not to be construed as a pre-judgment by the Board on their status. Once their status has been finally determined, appropriate amendments, if any are required, will be made to the bargaining unit description. In the normal course, the Board would issue a formal certificate signed by the Registrar, containing a full and complete description of the bargaining unit. In applications under section 6(1a) the Board is of the view that the formal certificate must await final determination of all disputes as to the composition of the bargaining unit, including the result of the vote amongst professional librarians to be conducted in File No. 0632-75-R. In the meantime, however, the applicant is hereby certified as the bargaining agent for:

All full-time academic staff employed by the respondent in the City of Ottawa in the Regional Municipality of Ottawa-Carleton and all full-time academic staff to whom at least 50% of the salary at the university is paid by the respondent, save and except:

- (a) members of the Board of Governors, Rector, Vice-Rectors, Assistant Vice-Rectors, Secretary to the University, Deans, Director of the Institute for International Co-operation and/or persons holding acting appointments and so acting in the above positions, all full-time academic staff engaged in the practice of medicine in the course of clinical teaching of medicine, members of the full-time academic staff employed on a full-time basis in a position outside the bargaining unit;
- (b) subject to final determination of their status, Department Chairman, Vice-Deans, Associate Dean, Director of Orientation Centre, Director of Department of Language Training, Director of Hospital Administration and Director of Child Study Centre; and
- (c) pending the Board's decision following the vote amongst professional librarians in File No. 0632-75-R (and, if necessary, subject to the Board's final determination of the status of Associate Librarian, Directors of Departmental Libraries, the Co-ordinator of

Planning and Research and Library Department Heads), all professional librarians employed in the respondent's library system.

The above description is to be read subject to the clarity notes agreed to by the parties and set out in paragraph 3, *supra*.

0335-75-R Canadian Independent Automotive Union, (Applicant) v. **Chrysler Canada Ltd.**, (Respondent).

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members P. J. O'Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: *R. Koskie, T. Kuttner, M. Iler and J. Bradi for the applicant; C. A. Morley and J. H. McGivney, Q.C., for the respondent.*

DECISION OF THE BOARD: September 5, 1975.

1. On September 2, 1975, a further hearing was held in this application for certification for the purpose of entertaining the representations of the parties as to whether the Board, in the light of the respondent's pending application for judicial review, should direct the Labour Relations officer to proceed with his inquiry in accordance with the Board's endorsement of July 3, 1975.

2. It may be useful to refer to the relevant background facts before turning to the arguments of the parties. The application was filed on May 23, 1975. At the initial hearing on June 16, the respondent contended, *inter alia*, that the applicant was not a trade union within the meaning of section 1(1) (n) of *The Labour Relations Act*. In an interim decision issued July 3, the majority of the Board rejected the respondent's contention and concluded that there were "no preliminary impediments to a finding that the applicant [is] a trade union within the meaning of section 1(1) (n) of the *Labour Relations Act*". In the same endorsement, it authorized D. K. Aynsley, Labour Relations Officer, to inquire into and report to the Board on the duties and responsibilities of the persons whom the applicant seeks to represent: i.e., the respondent's foremen and general foremen.

3. By letter dated August 1, 1975, the solicitors for the respondent advised the Board that they had received instructions from the respondent to apply to the Divisional Court to quash the Board's decision of July 3. On August 18, the Board was served with formal notice of application for judicial review. Between July 3 and August 18, the parties communicated with the Labour Relations Officer concerning possible hearing dates for the examination into the duties and responsibilities of the foremen and general foremen. We are satisfied that the discussions in which counsel for the respondent participated concerning the scheduling of the examinations were conditional upon the respondent's final decision as to whether to seek to quash the Board's interim decision in the courts. We attach no significance, therefore, to those discussions and find that the respondent did not, by its conduct or otherwise, waive its right to contend, as it now does, that the Board should stay the proceedings until the pending application for judicial review is finally determined.

4. Counsel for the respondent argued that, in exercising its discretion whether or not to proceed, the Board should give weight to the fact that if the respondent succeeds in the courts, the application for certification will necessarily fail. He argued that it could be wasteful, in both time and expense, for the Board to commence what is likely to be a protracted examination into the status of some six hundred persons when the Board's decision on the threshold issue of the applicant's status – an issue upon which the entire application turns – is under challenge. On the question of convenience, counsel contended that the respondent, a major automobile manufacturer, could least afford to have key personnel engaged in an examination of indefinite duration during the fall of the year, when model change-over occurs.

5. Counsel for the applicant advanced a number of reasons why the proceedings ought not to be stayed. He contended that the application for judicial review, even if perfected immediately, could not be heard before late October or early November. Further, he argued that if the matter were to proceed through all the potential appellate stages, it could be as long as two years before the issue is finally decided. Next, he pointed out that the Labour Relations officer would be required to take evidence as to the duties and responsibilities of the foremen and general foremen as of the date of application. According to counsel, it would become increasingly difficult for the witnesses to testify as to their duties and responsibilities on May 23, 1975, as time passed, especially if their duties and responsibilities were changed over the intervening period. He argued that it was in the interests of justice to obtain the best available evidence and that could best be done by immediate, rather than deferred, examinations. He also relied upon the provisions of section 70(2) of *The Labour Relations Act* and pointed out that if the applicant was correct in its assertion that the persons in question are employees within the meaning of the Act, their terms and conditions of employment cannot be altered while the application for certification is still pending. He therefore urged upon us that it was in the interests of the affected employees that unnecessary delays be avoided and that the Board be in a position to issue its final decision at the earliest possible date. In support of his contentions, he referred to a number of authorities, including *Armstrong Transport and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 938*, 64 CLLC ¶15,492; *Northern Electric Co. Ltd. v. LRB (Ont.)*, *Communications Workers of America, AFL, CIO and CLC*, *Northern Electric Employees Association and United Steelworkers of America*, 70 CLLC ¶14,016; *Bell v. Ontario Human Rights Commission*, (1971) 18 D.L.R. (ed) 1; *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183*, (1971) 3 O.R. 832; *Dry Bulk Forwarders Ltd.*, (1974) OLRB Rep., September, 628; *Toronto Forming (1965) Ltd.*, (1969) OLRB Rep., December, 1122; *McDonald's Restaurants of Canada Limited*, (1973) OLRB Rep., May, 287.

6. In our view, the governing authority is the decision of the Court of Appeal in the *Cedarvale Tree Services* case, *supra*. At page 840, Arnup, J.A., on behalf of the Court, stated:

"In my view there is an important distinction to be made between (i) the laying down of guide lines by the Court for the direction of persons who seek to invoke the jurisdiction of the Court, as to when and how they may do so when they seek to attack orders made by administrative tribunals as being in excess of their jurisdiction, on the one hand, and (ii) the laying down of guide lines as to the procedures to be followed by those tribunals themselves when an objection to their jurisdiction is made to them. The former is a proper exercise of the Court's function

in relation to its own process. *The latter, when directed to the processes of an administrative tribunal which has been given exclusive jurisdiction in its own field, is in my view not only unwise but unwarranted.*"

Later, at pp. 841-42 he says:

"It is clear to me that under the *Labour Relations Act* the Board is master of its own hours not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

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It is also clear law that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of *certiorari* or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the Court has actually been made prohibiting its further activity or quashing some order already made by which it assumed jurisdiction."

Those statements were recently affirmed in *Canadian Workers Union and Frankel Structural Steel Limited et al.*, (unreported), a decision of the Ontario Divisional Court, released June 13, 1975.

7. The Board's task in assessing what is just and convenient in particular circumstances is not an easy one. For one thing, justness and convenience are two quite dissimilar tests; considered individually, each test may dictate a different course of action. In order to achieve a just result, the potential for some degree of inconvenience may be inevitable. In the instant case, it is true, as the respondent contends, that if it succeeds in the court, the examinations conducted in the interim will have been in vain, and, to that extent, both parties – particularly the respondent – will have been inconvenienced. What we must do, therefore, is weigh the contending factors to determine which considerations are paramount.

8. In general, we believe that it is desirable for the Board to act, and to be seen to act, decisively and expeditiously in processing all applications which come before it – be they applications for certification, strike declarations or any other proceeding. To await the outcome of the court proceedings in this case would be to risk adding significantly to the time required to process the application to completion.

9. We believe that our paramount duty is to ensure that the rights and obligations of both parties – as well as the affected persons – be determined with the least possible delay.

10. Although the point was not argued before us, it is conceivable that our eventual finding on the status of the foremen and general foreman may render the continuation of court proceedings unnecessary. That possibility, of course, is mere speculation and is con-

tingent upon findings on evidence and representations not yet before us, as well as the timing and progress of the concurrent proceedings in the courts. In the final analysis, little purpose is served by speculating on what may happen in the courts or what the Board's final determination may be on the merits. It is sufficient to say that, on balance, we are persuaded that, in the particular circumstances, no intolerable inconvenience will result if we proceed, and that the prospects of a more expeditious – and, therefore, more just – resolution of the dispute are enhanced if we do so.

11. In the Board's majority decision of July 3, 1975, Mr. D. K. Aynsley, Labour Relations officer, was authorized to inquire into and report to the Board on the duties and responsibilities of foremen and general foremen. Since that decision, Mr. Aynsley has undertaken other commitments. Accordingly, the Board revokes his appointment and authorizes Mr. A. A. Morrow, Labour Relations Officer, to proceed with the inquiry on the same terms and conditions, on the earliest available date.

0721-75-R Ontario Nurses' Association, (Applicant) v. Kemptville District Hospital, (Respondent).

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members E. Boyer and J.E.C. Robinson, Q.C.

APPEARANCES: *K.R. Lewis for the applicant; Ms. Denise Howe and L.M. Berge for the respondent.*

DECISION OF THE BOARD: September 8, 1975

2. There is a dispute with respect to the inclusion in or exclusion from the bargaining unit of head nurses. The respondent alleges that there are four persons so classified. The respondent seeks the exclusion of this category based on the allegation that the persons in the category exercise managerial functions.

3. The inclusion in or exclusion from the bargaining unit of the Head Nurse category cannot affect the applicant's rights to certification, either for the proposed full time bargaining unit or for the proposed part-time bargaining unit.

4. The applicant requests the Board to exercise its power under section 6 (1a) of the Act and certify the applicant for both bargaining units, pending the final resolution of the composition of the bargaining units. This request is not opposed by the respondent.

5. Immediately, following the hearing of August 25, 1975, the Board appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of those persons who are classified by the respondent as head nurse.

6. The final resolution of the composition of the bargaining units will be determined following the filing of the report of the Labour Relations Officer. However, based on the evi-

dence before it, the Board finds that more than fifty-five per cent of the employees of the respondent in both bargaining units, however they are eventually described at the time the application was made were members of the applicant on the terminal date fixed for this application being August 15, 1975, and the date which the Board determines under section 92(2) (j) of the Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. Since this is one of the first cases in which certification has issued under section 6 (1a) of the Act, it may be useful to set out procedures which the Board deemed appropriate in applications of this sort. Any certification at this stage, must obviously, exclude any disputed categories. Their exclusion at this point is not to be construed as a pre-judgment by the Board as their status. Once the status of the disputed categories has been finally determined, appropriate amendments, if required, will be made to the bargaining unit description. In the normal course, the Board will issue a formal certificate signed by the Registrar containing a full and complete description of the bargaining unit. In applications under section 6(1a) the Board is of the view that the formal certificate must await final determination of all matters in dispute and the composition of the bargaining unit. In the meantime, however, the applicant is hereby certified as the bargaining agent for the following bargaining units:

- (a) Bargaining Unit #1. All registered and graduate nurses employed in a nursing capacity by the respondent at Kemptville, save and except the Director of Nursing, persons above the rank of the Director of Nursing, Head Nurses, and persons who are regularly employed for not more than 24 hours per week.
- (b) Bargaining Unit #2. All registered and graduate nurses employed in a nursing capacity by the respondent at Kemptville who are regularly employed for not more than 24 hours per week, save and except the Director of Nursing, persons above the rank of the Director of Nursing, and Head Nurses.

0016-75-U Canadian Union of Public Employees, Local 1221, (Applicant) v. **T.L.C. Villa Nursing Centre**, (Respondent).

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Jeffrey Sack and Murray Gray for the applicant; S. C. Bernardo for the respondent.*

DECISION OF THE BOARD: September 8, 1975

1. The name "T.L.C. Villa Nursing Centre, June J. Gately, and Arthur Frampton" appearing in the style of cause of this application as the name of the respondent is amended to read: "T.L.C. Villa Nursing Centre."

2. Following completion of the original hearing of this matter due to the unusual circumstances of this case, the Board served notice of its intention to conduct a further hearing for the purpose of allowing the parties an opportunity to clarify, review and confirm their submissions which were made to the Board at the original hearing. Counsel for the parties appeared at the last hearing conducted on July 8, and at this time it was brought to the attention of the Chairman of the Panel that he had acted as Chairman of a Board of Arbitration constituted under the Hospital Labour Disputes Arbitration Act for the purpose of dealing with matters of dispute between the applicant and Martingale Villa Nursing Home. Counsel for the applicant informed the Chairman that in the course of the proceedings conducted by the Board of Arbitration referred to above there was discussion with respect to an alleged "contracting out" by Martingale Villa Nursing Home and the ramifications resulting therefrom.

3. It is relevant to note that prior to July 8, 1975, there were no submissions with respect to the constitution of the panel hearing this case, notwithstanding the fact that one of the representatives of the applicant who attended all earlier proceedings must have then known the details of proceedings affecting Martingale Villa Nursing Home under the Hospital Labour Disputes Arbitration Act.

4. The respondent in this case is a successor company to Martingale Villa Nursing Home and there is no doubt that the issue of contracting out is relevant for the purpose of this application.

5. The respondent has submitted that there are no grounds by which the Chairman should be disqualified or should consider disqualifying himself, and that in any event the request of the applicant which was made on July 8, 1975, should not succeed, because the applicant must have waived any objection it might have had by allowing the matter to proceed without raising the objection. The objection was not raised until all of the evidence was heard and arguments were presented by the parties.

6. In reviewing other arbitration matters in which he has been involved, the Chairman of the panel has become aware that he also acted as Chairman of an arbitration board which dealt with the discharge of an employee by Martingale Villa Nursing Home. A hearing was conducted on this matter on March 5, 1975, and at this hearing there was evidence given with respect to alleged activities by Martingale Villa Nursing Home in engaging employees through a Nursing Agency. There was other evidence with respect to the results of these alleged activities. It should be noted that the representative of the applicant union, Edward Mr. Gray, was the spokesman before that arbitration board. He also attended the original hearing conducted by the Board in this case.

7. Under the particular circumstances which have arisen, it is the view of the Chairman that it would not appear proper for him to further participate in this case. While the failure of the applicant to draw to the attention of the chairman his earlier participation in arbitration matters with respect to a predecessor employer cannot be disregarded, nevertheless having informed himself about the additional arbitration case involving this employer when operating under another name, the Chairman feels that he should withdraw from this matter.

8. It is appropriate to refer to the words used by Lord Hewart in the Case *R. v. Sussex Justices, ex parte McCarthy*, (1924) 1KB 256, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

9. The Board directs the Registrar to select a new panel of the Board for the hearing of this case and to set a new hearing date when the matter will be heard *de novo*.

10. While it is regretted that there has been delay in dealing with this matter, it is the feeling of the Chairman in withdrawing from this case, that both of the parties must be satisfied that the criteria outlined by Lord Hewart has been satisfied. This is the decisive factor.

7365-74-R Teamsters Union, Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. **Livingston Transportation Limited**, (Respondent) v. International Woodworkers of America, (Intervener).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *I.J. Thomson and Don Swait for the applicant; T.F. Storie and Wm. Johnston for the respondent; no one appearing for the intervener.*

DECISION OF VICE-CHAIRMAN GEORGE W. ADAMS AND BOARD MEMBER J.D. BELL: September 4, 1975

3. The applicant has applied to be designated as the exclusive bargaining agent for "all employees of the respondent company working in or out of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office staff, supervisors, persons under separate contract with the company and referred to as owner-operators (brokers) and those covered by an existing collective agreement with the International Woodworkers of America".

4. The intervener filed a collective agreement between itself and Livingston Mutual Warehousing Limited dated May 10, 1974 and made reference to a memorandum of settlement that was said to set out terms of a collective agreement between itself and the respondent.

In fact the Board was told that a formal collective agreement had been entered into on March 6, 1975. However, the intervener did not claim bargaining rights for the employees subject to this application and therefore the normal exclusion making reference to a collective agreement between the intervener and respondent will accommodate the intervener's interest in the application.

5. The respondent objected to the exclusion of "persons under separate contract with the company and referred to as owner-operators (brokers)" and submitted that these persons were employees and, according to the Board's jurisprudence, ought to be included in the bargaining unit. The respondent agreed that there was no basis for excluding "sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" in the circumstances and accordingly the respondent's proposed bargaining unit was "all employees of the respondent employed at and working out of its terminal on Horner Avenue in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting agreements with International Woodworkers of America".

6. The applicant took the position that the so-called brokers or owner-operators were not employees but were independent contractors and, alternatively, submitted that if they were employees their community of interest did not reside with the other drivers and thus their exclusion would be appropriate.

7. The Board appointed an examiner.

8. However, the parties agreed the following statement of fact and requested an opportunity to make representations to the Board.

"For the purpose of clarity owner-operators employed by the Respondent shall be referred to as "brokers" herein and other persons not under individual contract with the Respondent shall be referred to as "drivers"."

This statement of fact was arrived at pursuant to a decision of the Labour Relations Board dated April 2nd, 1975 appointing Mr. L. Stickland as an Examiner to "... inquire into the list of employees filed by the respondent and into the appropriateness of the bargaining unit with particular reference to the duties, responsibilities and nature of employment of such persons designated by the applicant as 'owner-operators' and to report back to the Board."

- "1. The Respondent, Livingston Transportation Limited, is a common carrier engaged in hauling freight throughout Ontario and for the purposes of this Statement of Fact operating from its terminal at 137 Horner Avenue in Metropolitan Toronto. It has been operating from this location for approximately one and one-half years utilizing certain "C" P.C.V. authority to transfer goods in and out of Toronto to points in Ontario and to make local deliveries pursuant to a Toronto cartage licence held by the Respondent. It maintains a dispatch office at 137 Horner Avenue and loads are dispatched by the same individual to both brokers and drivers.
2. At the date of Application for Certification before the Labour Relations Board on February 26, 1975 the operations involved the employment of those persons whose names are set out in Schedule A attached hereto. Schedule A designates the status of such persons as either driver or broker respectively.

3. Those persons designated on Schedule A as brokers have executed individual contracts during the period May 1974 to February 1975 inclusive in the form attached as Schedule B hereto. With the exception of one broker, Wilson T. Petro (who was originally employed as a driver by the Respondent before executing a broker contract in September of 1974) the balance of persons designated as brokers in Schedule A were initially employed as brokers.
4. The tractors used by the brokers pursuant to their contracts are beneficially owned by them and any financing or lease obligations are solely those of the broker with the exception of W. Ewels and B. Ridout, both of whom purchased their tractors from the Respondent. Ewels and Ridout are currently making weekly payments to the Respondent with respect to the outstanding balances owed by them for the purchase of their tractors.
5. The brokers' tractors carry the Respondent's name and are registered in the name of the Respondent with the Ministry of Transportation and Communications both for Commercial and P.C.V. registration purposes. This is done to allow the brokers to operate under the P.C.V. licences held by the Respondent and the beneficial ownership of the tractors remain with the respective brokers with the exception of Ewels and Ridout.
6. The tractors are normally painted in the fleet colours of the Respondent within thirty days of execution of the broker contract and in accordance with its provisions. The tractors operated by the brokers are parked at their own expense at locations arranged by them and while there is no requirement that their units be left at the Respondent's Toronto depot they are, as a matter of practice, parked there.
7. The brokers pay for and are responsible for all fuel, maintenance and repairs of their tractors including either on or off the road expenses. The Respondent does not have a gasoline licence at its Toronto terminal and therefore no fuel is purchased by the brokers from it.
8. Drivers and brokers are assigned to city and highway work. At all material times with the exception of a period commencing approximately March 3, 1975 there has been sufficient business to keep brokers and drivers fully employed.
9. The Respondent has published rules and regulations, a copy of which is attached hereto as Schedule C that have equal application to drivers and brokers subject to any specific provisions of the broker contracts.
10. Where the brokers seek to substitute drivers in the operation of their tractors the Respondent has the right to and does satisfy itself as to the qualifications and ability of such substitutes through testing both for insurance purposes and compliance with paragraph 5 of Schedule B.
11. Both brokers and drivers deliver customers' goods according to a delivery schedule prepared by the Respondent reflecting customer requirements. In the case of brokers, they alone are responsible for any loss, damage or shortage of freight. Both brokers and drivers are covered by insurance in the Respondent's name and purchased by it on a fleet basis. The brokers are charged for the respective *pro rata* share of such insurance.

12. Brokers are paid solely on the basis of a percentage of revenue received by the Respondent for the haulage of freight and are not eligible for overtime pay. Payment is made to brokers on a weekly basis less expenses deducted by the Respondent for such things as their respective commercial licence registration, P.C.V. plates, insurance and other related matters. Drivers employed by the Respondent are paid on a bi-weekly basis based either on hours worked or miles driven or a combination thereof with no deductions for those matters relating to brokers above. Drivers are eligible for overtime pay.

13. Brokers are not covered under any unemployment insurance scheme by the Respondent nor does the Company deduct monies for income tax purposes. Participation in such coverage is solely the responsibility of the broker as is the case in regard to Canada Pension Plan, group insurance, related fringe benefits including vacation pay and statutory holidays and Workmen's Compensation although the Respondent requires coverage of the broker under the latter. Drivers are provided with coverage by the Respondent under a group insurance plan, Ontario Health Insurance Plan and are additionally eligible for fringe benefits including vacations with pay and statutory holidays.

14. To date, the brokers have driven exclusively for the Respondent and while there is no specific contractual requirement failure to make themselves available to the detriment of the Respondent's customers would be a basis for termination of the contract by the Respondent along with the removal of its P.C.V. plates. At the same time, there is no restrictive covenant between the broker and the Respondent precluding any competition by the broker should the relationship be terminated. Other conditions of employment between the broker and the Respondent are in accordance with the Contract attached as Schedule B hereto.

15. Neither the brokers nor the drivers are provided with or required to wear uniforms.

16. In accordance with the several contracts executed between the brokers and the Respondent either party may terminate the agreement on thirty days' notice for any cause.

17. Neither drivers nor brokers are required to solicit business for the Respondent and their remuneration is in no contingent upon business obtained by them.

18. Schedule B is identical to the form of broker contract that was utilized by the Respondent in its operation at St. Thomas, Ontario (except as to the method of remuneration) and was the subject matter of a series of hearings before the Ontario Labour Relations Board (Board File No. 854-71-M, etc.) in similar proceedings."

9. At the outset of the hearing convened to hear the representations of the parties the applicant agreed that the persons in question were employees and thus confined its argument to the issue of the appropriate unit in the circumstances. In contending that separate bargaining units would be appropriate the applicant's position is best set out in its letter to the Board dated May 7, 1975. This letter reads, in part:

"We submit there is no similarity between the two classifications (owner-operators and drivers). The Board will note that with the exclusion of one individual, Wilson T. Petro, all the other brokers were hired as brokers and have continued that relationship with the company over

the period of time and have separate signed contracts with the company.

On Page 5, Paragraph 12 sets out the basic difference between the two groups as far as pay is concerned and brings out the different relationship between the two groups. Paragraph 13 further strengthens our proposal for separate units. The company made much of the fact at the hearing before the Board that this issue had been determined by the Board in a previous case (Board File #854-71-N) and that the Board in that instance had ruled that these people were employees for the purposes of the Act. In that case the brokers at St. Thomas were paid mileage exactly the same as the employees but in the instance here the brokers are paid a percentage of the revenue received for their particular work while the employees receive mileage rate, hourly rate and overtime.

If they were both included in the one unit it would be an impossible situation for a negotiator who would be negotiating for hourly and mileage rates and other benefits for one group and a contract being already in existence between the respondent and brokers on a percentage basis for others.

Finally we urge the Board not to put these two groups together and the Board will note that the Canada Labour Relations Board and British Columbia Board place the two groups into separate units because of their different interests.

Lastly, we know that the brokers will not support the position of the employees for a union and since the number of brokers is in excess of the number of employees you will deny the right of the "employees" to union benefits if you accept the submission of the respondent."

10. On the other hand, the respondent referred the Board to the principles that are normally applicable in such determinations and submitted that there was scant reason for separate bargaining units.

11. We agree with the parties that the brokers or owner-operators are employees for the purposes of the *Labour Relations Act*. This Board has often had to make determinations in the legal shadow land between undisputable entrepreneurial and employment statuses. And in making these determinations the Board applies a complex of considerations intended to ascertain whether the persons in question are in business for themselves or whether their relationship with another person more closely resembles the relationship of an employee than that of an independent contractor. These considerations have been detailed elsewhere. (See *Hamilton Trucking Limited* [1971] OLRB Reps. 237; *Livingston Transportation Limited* [1972] OLRB Reps. 488; *Agilis Corporation Limited* [1971] OLRB Reps. 232; *Erb Transport Limited* [1972] OLRB Reps. 388; *Michael Rosen Real Estate Limited* [1972] Reps. 766; *Shell Canada Limited* [1974] OLRB Reps. 200; *Gulf Oil Canada Limited* [1974] OLRB Reps. 245; *Re Becker Milk Co. Ltd.* (1973) 1 L.A.C. (2d) 337 (Carter). And see generally Arthurs, *The Dependent Contractor: A Study of The Legal Problems of Countervailing*

Power (1965) 16 U.T.L.H. 89. For the American jurisprudence see *The Seven-Up Bottling Co. of Detroit Inc.* 120 NLRB 1032; *Golden Age Dayton Corporation* 124 NLRB 916.)

12. Thus the Board is left with the issue of the appropriate bargaining unit in the circumstances. The applicant has submitted that there is no similarity between the two classifications (owner-operators and drivers) and distinguished this case from the earlier *Livingston Transportation Limited* case in that "the brokers at St. Thomas were paid mileage exactly the same as the employees but in the instance here the brokers are paid a percentage of the revenue received for their particular work while the employees receive mileage rate, hourly rate and overtime". Its letter goes on to contend that (1) the inclusion of the brokers in the bargaining unit would confront negotiators with an impossible problem; (2) the British Columbia and Canada boards place the two groups into separate units because of their different interests; and lastly (3) because the brokers will not support the position of the employees for a union and since the number of brokers is in excess of the number of employees, to include them in the same unit will deny the right of the "employees" to union benefits.

13. While section 3 of the legislation stipulates that every person is free to join a trade union of his own choice section 6 imposes an obligation upon the Board to determine a unit of employees that is appropriate for collective bargaining. The Board's decision-making in regard to the appropriate unit therefore has an impact upon a person's freedom "to join a trade union of his own choice and participate in its lawful activities", if the latter phrase is meant to include representation by a trade union for collective bargaining purposes. Harmonious collective bargaining, an aspiration declared in the preamble to the legislation, requires a viable unit of employees upon which to build. A narrowly defined unit may ignore the functional coherence of the work place resulting in jurisdictional disputes and administrative nightmares. Too narrow a unit may deprive employees of any real bargaining power, and at the same time may leave them with insufficient room to negotiate innovative and comprehensive benefit systems, a result which could convert collective bargaining into an illusory process. On the other hand, too comprehensive a unit can also result in administrative difficulties. Moreover, a policy that would place employees with widely differing interests in the same bargaining unit would deprive many employees of all the benefits of collective bargaining legislation. Accordingly labour relations boards have had to strike a balance somewhere in between these two extremes. (See Jones, *Self-Determination vs. Stability of Labour Relations* (1960), 58 Mich. L. Rev. 313; Chamberlain, *Collective Bargaining* (1951) c. 8, 9; Herman, *Determination of the Appropriate Bargaining Unit* (1966).

14. Because of the presence of these conflicting values the decision-making has resulted in a checklist of principles and policies of differing weight. But the weight attributed to any one consideration is very much dependent upon the nature of the industry in which specific parties operate.

15. This is not to deny that specific rules exist to resolve most cases. Because the parties needed more certainty and predictability than these general principles and policies could provide labour relations boards, by way of adjudication, have laid down more or less arbitrary rules that describe the vast majority of bargaining units in the industries they regulate. As a result of these administrative rules the standard production, office and craft units have come to exist.

16. But applications continue to be brought that challenge the standard units and require recourse to the more amorphous policies and principles set out of which the standard units were created. This application is such an occasion.

17. One of the most prominent of these general considerations is the community of interest among employees. This phrase attempts to capsulize the cohesiveness of a group of employees for the purpose of collective bargaining and in applying the test labour boards have regard to the nature of the work performed; the conditions of employment; the skills of employees; the administration and supervision of the employment relationship; geographic circumstances; and the functional coherence and interdependence of the job functions under consideration (*Usarco Ltd.* [1967] OLRB Reps. Sept. 526).

18. The drivers and the owner-operators are dispatched from the same location, perform the same kind of work and possess identical skills. Further, they are subject to the same rules and regulations, and operate within identical geographic limits. On the other hand owner-drivers own their own vehicles and this has resulted in a very different method of payment – a percentage of the revenue received by the respondent for the haulage of freight. And it is this fact upon which the applicant's argument is based. Because of the method of payment to the owner-operators *at the present*, they are not concerned with overtime and do not participate in any of the fringe benefits that apply to the drivers. Moreover, they are responsible for the maintenance of their vehicles and for the costs associated with the licensing and insurance requirements of the industry. Presumably these differences cause the applicant to claim that their inclusion in the bargaining unit would make negotiations impossible.

19. The Board was not provided with the kind of evidence that might support this claim. The owner-operators did not intervene and were not examined in that the parties agreed to the facts. Thus the Board is not in possession of all the details of the financial constraints under which they operate. We do not know the size and the nature of the investments in their vehicles, their operating expenses, their interest and participation in benefit programs, the rate of return on their financial and human investments, the total number of hours that they work in a week and the legal and practical difficulties in working for other employers. For example, for all the Board knows, when the expenses of the owner-operators are deducted from the revenue they receive, the owner-operators may be getting paid a rate comparable to the drivers. (See *Livingston Transportation Limited* [1972] OLRB Reps. 488 at ¶12.) Moreover, because the form of remuneration is an unreliable and highly manipulative factor, labour boards have tended to place little emphasis on this general factor or at least the factor has not been considered determinative. (See *Sears Roebuck and Co. (Pittsburg, Pa.)* 1969 CCH, NLRB 21,228; *Minneapolis-Honeywell Regulator Co.* (1965) 115 NLRB 334.)

In the absence of these details the Board lacks sufficient information about the extent of the alleged conflicting interests between the owner-operators and the drivers. These details are critical to the applicant's case if it is serious in requesting the Board to ignore the numerous similar interests outlined above. Moreover, we must observe that many of these differences, particularly the method of payment, are pre-collective bargaining phenomena. There would appear to be no intrinsic reason to infer that these differences would continue if collective bargaining is extended to the owner-operators.

20. Another general consideration that is relevant to this case is the policy against fragmenting bargaining units. A number of small units within an employer's work force is thought to result in a greater incidence of conflict because more than one collective agreement must be negotiated and a multiplicity of units and trade unions encourage competing jurisdictional claims. Further, as mentioned above, more comprehensive units provide employees with greater economic security. Large units can support more sophisticated benefit programs and provide an employee with access to a greater number of jobs before he is laid off. These factors most clearly militate against the applicant's claim.

21. The organizational structure of the employer cannot be ignored. If employees fall into distinct groups from the viewpoint of supervision and geography such groups often represent viable units for the purposes of collective bargaining. The facts before the Board in this regard do not support the applicant's request. The drivers and owner-operators are dispatched from the same location and both are assigned to city and highway work. Thus the employer's organizational structure does not distinguish between the two groups of employees.

22. An applicant does not have to come forward with the most appropriate bargaining unit (*The Board of Education for the City of Toronto* [1970] OLRB Reps. 430). But it must satisfy the Board that the unit it seeks to represent is appropriate within the above discussed principles and policies and we cannot find that the applicant has met this onus in the facts at hand.

23. The applicant drew the Board's attention to the provisions of the *British Columbia Labour Code* S.B.C. 1973, c. 122, s. 1, s. 48 and the *Canada Labour Code* R.S.C. 1970, C.L-1, s. 107. It is submitted that in both jurisdictions separate units would probably be given. Unfortunately no clear authority was cited to support this contention – in fact the British Columbia legislation contemplates one bargaining unit although section 48 requires the Board to satisfy itself that reasonable procedures have been developed to integrate dependent contractors into the bargaining unit. The Board has considered the *Midland Superior Express Limited* decision of the Canada Board [1974] 1 Canadian LRBR 267, but in that case a distinction was made between those drivers who were assigned to over-the-road hauling of goods on runs that involved long distance trips where two drivers in the tractor cab were away from home for days and those drivers assigned to short "express runs" of a day. This is a distinction the National Labour Relations Board has accepted but it is not based on whether the drivers own the vehicles or not. (See *Georgian Highway Express Inc.* 150 NLRB 1649; *Albuquerque Phoenix Express* 165, CCH, NLRB ¶9,479, 153 NLRB 430 (No. 47) eng'd (CA-10, 1966) 54 LC ¶11,557, 368 F (2d) 451.) The *Byers Transport Limited* decision [1964] 1 Canadian LRBR 343 is more in point but the distinction between owner-drivers and "other employees" is obiter and the particular facts supporting the distinction are not revealed. Accordingly neither case is of assistance.

24. The applicant claimed that the inclusion of owner-operators in the bargaining unit would result in an impossible task for negotiators. But if the Board is to act on such submissions the applicant should be prepared to outline the facts which support the conclusions. The applicant provided the Board with insufficient evidence. Moreover, if regard is had to the experience before the National Labour Relations Board just the opposite is suggested. Many bargaining units containing drivers and owner-operators have been found appropriate in that jurisdiction and it has been the applicants that have requested the inclu-

sion of the owner-operators before that Board. (See *Florida Texas Freight Inc.* (1972 CCH, NLRB ¶23,354), *Pony Trucking Inc.* (1972 CCH, NLRB ¶24,497) 198 NLRB No. 59, aff'd 486 F (2d) 1039; *Aetna Freight Lines Inc.* 1972 CCH, NLRB ¶23,741, 94 NLRB 740; *Tryon Trucking Inc.* (1971 CCH, NLRB ¶23,337), 192 NLRB 764; *The Maxwell Company* (1967 CCH, NLRB ¶21,364), 174 NLRB 713, aff'd (60 LC ¶10,167), 414 F (2d) 447; *Deaton Inc.* (1971 CCH, NLRB ¶22,635), 187 NLRB 780; *Ace Doran Hauling and Rigging Co.* (1974-75 CCH, NLRB ¶15,172); *Pioneer Holding Co.* (1960 CCH, NLRB ¶8,641,) 126 NLRB No. 133; *Alterman Transport Lines* (1969 CCH, NLRB ¶21,150) 1978 NLRB No. 21.) The wealth of this experience would appear to cut against the applicant's claim that negotiations for so-called "mixed units" are impossible. Finally, in two cases where the ownership of a vehicle was relied upon as an exclusive factor in requesting separate bargaining units the National Labour Relations Board rejected the proposition. (See *Archie's Motor Freight Inc.* (1961 CCH, NLRB ¶9,818, 130 NLRB 1627; *Indiannapolis Times Publishing Co.* (1949) 82 NLRB 1385.)

25. The Board does not want this case construed as a precedent for the proposition that so-called owner-operators will not be entitled to a separate bargaining. Each case must be judged on its own facts and circumstances may arise when the very factors that have, over the years given rise to difficulties in determining their employment status will justify a labour board in finding that a separate bargaining unit is appropriate. For example, a group of owner-operators may have the same kind of work under the same conditions with identical supervision an applicant must be able to rely on more than the method of remuneration and claims that "problems" will be encountered in the collective bargaining.

26. For all of these reasons the Board finds that all employees of the respondent employed and working out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff and persons covered by subsisting agreements with the International Woodworkers of America, constitute a unit of employees of the respondent appropriate for collective bargaining.

27. The Board is satisfied on the basis of all the evidence before it that not less than thirty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the application and the date which the Board determines under section 92(2) (j) of *The Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

28. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

29. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

30. Should the owner-operators wish to make representations in regard to this result they may do so by way of a request for reconsideration. Accordingly the Board will not direct the posting of a new Form 5 with an amended bargaining unit description.

31. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.
2. The unit of "drivers" sought by the applicant is appropriate.
3. The unit of "drivers and brokers" proposed by the respondent is inappropriate.
4. Two units, one of "drivers" and one of "brokers" would also be appropriate.
5. The majority decision to accept the unit proposed by the respondent denies the freedom of choice stipulated by section 3 of *The Labour Relations Act*.

"3. Every person is free to join a trade union of his own choice and to participate in its lawful activities. R.S.O. 1970, c. 232."

6. It is clear from the statement of fact that the community of interest of drivers and brokers are fundamentally and widely different.

Drivers:

- a) Drive company owned vehicles
- b) Paid an hourly rate
- c) Paid overtime
- d) Paid mileage
- e) Do not share in the revenue received by the respondent for the haulage of freight
- f) Are not responsible for loss, damage or shortage of freight
- g) Do not pay any part of the insurance plan carried by the respondent
- h) Do not pay for the commercial license, registration, P.C.V. plates, insurance or related matters
- i) Respondent makes income tax deductions, provides unemployment insurance coverage, Canada Pension Plan coverage, group insurance plan, OHIP, and Workmen's Compensation coverage
- j) Respondent provides paid vacations and statutory holidays.

Brokers:

- a) Drive their own vehicles
- b) No hourly rate paid
- c) No overtime paid
- d) No mileage paid
- e) Paid solely on the basis of a percentage of revenue received by the respondent for the haulage of freight
- f) Are responsible for loss, damage or shortage of freight
- g) Pay their respective pro rata share of the insurance plan carried by the respondent
- h) Are charged for their respective commercial license, registration, P.C.V. plates, insurance and other related matters
- i) Brokers are individually responsible for income tax, unemployment insurance, Canada Pension Plan, personal insurance and Workmen's Compensation. With respect to the latter, brokers are contractually bound to seek coverage
- j) No paid vacations or statutory holidays are provided.

7. From the facts it is evident that brokers must perform for themselves many of the bookkeeping operations which are necessary in contemporary Canadian society. Drivers on the other hand rely on the respondent's pay office to perform these essential functions.

8. More importantly, the beneficial interest enjoyed by the brokers in their tractors gives them assets and opportunities not available to drivers in the event employment with the respondent is interrupted or terminated. While drivers have only their skills to market, brokers have both their skills as drivers and their tractors to offer to prospective employers. If no employment were available, brokers could sell their tractors or use them as security for loans. Obviously, brokers have more financial security than drivers. Furthermore, brokers may occupy a different tax position since they probably can claim capital cost allowances and may be subject to both recapture and capital gains taxes.

9. Drivers and brokers both work to earn a living. But in the circumstances of this case, the underpinnings of the broker's livelihood are so different from that of the drivers, that they are cast into an entirely distinct relationship with their employer. The brokers must obviously also have a financial perspective unique to the collective bargaining situation. To contemplate the task of a bargaining committee representing the interests of drivers and brokers at the same bargaining table with the employer is no less than a scene of nightmarish schizophrenia.

10. Paragraph 13 of the majority decision refers to the *Livingston Transportation Limited*, page 488 [1972] OLRB Reps. In that case the respondent strongly opposed employee status for "independent contractors", as "brokers" were there designated. In dealing with the difficulty of drawing a line between an employment relationship and a contract relationship, the majority said in para. 4, in part:

"In all these Cases the drivers who operate away from the premises are not subject to any immediate control. *In all cases the drivers pick up the product and take it to a destination.* Practically, since time and cost are of importance, *most drivers would tend to use the same routes to reach their destination.* Also, *the dispatching, loading and unloading of product are similar* in the cases of employees and independent contractors. *What differs is the nature of the arrangement and their effect on the rights, duties and privileges of the parties to the arrangement.*" (emphasis added)

Although said with regard to the question of whether "brokers" were "employees", the description of the work performed and the method of doing the job are the same as in the instant case. The difference between "drivers" and "brokers" in that case is expressed in the underlined sentence – "*the nature of the arrangements and their effect on the rights, duties and privileges of the parties to the arrangement.*"

11. The respondent in the instant case is the same company, *Livingston Transportation Limited*, as in the earlier case. But now the respondent abandons all its arguments made in the earlier case and insists that not only are "brokers" employees, as was found in that case, but that "employee brokers" and "employee drivers" are indistinguishable as to "*rights, duties and privileges*", and should be included in one bargaining unit.

12. In the earlier *Livingston* case cited above, John Richard Burwell was examined and found to be an employee. It is of interest that the evidence concerning Mr. Burwell reveals that "the PCV and motor registration licenses and insurance are in the name of and paid for by the Respondent..." Also, "He is paid by the mile but all records are kept by the Respondent". The evidence concerning the brokers in the instant case is that they are charged for their respective commercial license, registration, P.C.V. plates, insurance and other related matters. They are not paid mileage, but instead on the basis of a percentage of revenue received by the respondent. The earlier case refers to Mr. Burwell again in para. 12: "He cannot hire himself out independently as a P.C.V. owner, the P.C.V. license is an essential tool to the carrying on of his business and its withdrawal by *Livingston* would impose severe limitations on his ability to carry on any business". In para. 12 the majority also said "that his payment is in a different form than the ordinary wage cheque is of little significance". It is this sentence that the majority in the instant case appear to attach great weight in deciding that "employee brokers" and "employee drivers" have like interests to negotiate at the collective bargaining table. However, the thrust of these two cases are quite different, and the position taken by the respondent completely opposite. The context of the case decided by Mr. Shime was entirely different; furthermore, the basis of payment in that case was on mileage for both "brokers" and "drivers". In the instant case, the basis of payment for "drivers" and "brokers" is entirely different in all of its aspects. There is no similarity whatsoever – and that is where the widely divergent interests of the two groups of employees become apparent as separate and distinct communities of interest at the collective bargaining table opposite the respondent.

13. The parties in the present case have agreed upon a statement of fact. The status of the brokers as employees is not disputed. There being no evidence to indicate collusion between the applicant and the respondent, the Board should accept the stated facts at face value. The employer has developed a formula for compensating its employees and operates with two groups which comprise all of the employees, each treated in a very different manner. The union does not challenge the scheme, but accepts the fact of the difference. The employer cannot now be heard to argue that there is no significant difference in the method of employing these two groups of employees. The union on the other hand is confronted with the difference created by the employer, and is reasonably entitled to argue that there is no community of interest in the circumstances of this case.

14. The Board has interpreted section 6(1) of the Act to require only that the applicant represent employees in an appropriate bargaining unit. That unit need not be the most appropriate unit conceivable and the Board considers each case on its own merits (*Board of Education for the City of Toronto* [1970] OLRB Reps. 430). Thus, in the instant case, the Board should accept as appropriate the applicant's proposed bargaining unit whose composition derives logically from the respondent's practice of employing both drivers and brokers.

15. Weight should be given to the bargaining unit applied for. In the *Board of Education for the City of Toronto*, (*supra*), case, the chairman observed:

"In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of *The Labour Relations Act*.

Thus the Board should be reluctant to establish a unit larger than the one applied for where the applicant union lacks sufficient support for certification for such a larger unit if the proposed smaller unit is appropriate. The United States National Labour Relations Board abandoned policies favouring large scale bargaining units where unions were reluctant to organize on such a scale in two cases; *Save-On Drugs Inc.* 1962, C.C.H. NLRB ¶11,632, and *Quaker City Life Insurance Co.* 1961, C.C.H. NLRB, ¶10,699, which were cited in the *Board of Education for the City of Toronto*, (*supra*), decision. In the *Quaker City*, (*supra*), case, the Board held:

“Clearly this language of the *Metropolitan Life* case (which established the policy in favour of a large unit) indicates that the rule was adopted solely in anticipation of broader organization on a company or state wide basis, which at the time appeared imminent. As a practical matter, however, such state or company wide organization has not materialized and the result of the rule has been to arrest the organizational development of insurance agents to an extent never contemplated by the Act, or for that matter, by the Board that decided the *Metropolitan Life* case...The rule was adopted for the purpose of permitting organization on a state or employer-wide basis, which did not develop as anticipated. Contrary to our dissenting colleagues, we regard this as a valid reason for changing the rule. Obviously, when the purpose for which rule has been established fails, the rule should also fail. *This is especially so with respect to a rule which unfairly prejudices the collective bargaining rights of employees.*”

[emphasis added]

While the circumstances surrounding that case are quite different from those of the present case, the principle which guided the National Labour Relations Board is relevant here. In abandoning its policy in favour of large scale bargaining units, the American Board made it clear that the importance to be attached to a large fixed bargaining unit is subordinate to the right of employees to bargain collectively and should not impede the exercise of that right. Similarly, this Board should not frustrate the right of the drivers to be represented by a union of their choice by creating a bargaining unit where the applicant union lacks sufficient support. The cause of collective bargaining will not be furthered by forcing trade unions to compete in constituencies where they lack appeal. This is not meant to advocate the gerrymandering of bargaining units simply to ensure trade union victories. Rather, it is intended to defend the right of employees to be represented in a bargaining unit by a trade union where a community of interest exists and the majority of the employees desire representation. That defence will be provided by the Board's accepting as appropriate the bargaining unit applied for and by declining to establish a larger unit as recommended by the respondent which would embrace two distinct groups of employees. The union's view of what would be an appropriate bargaining unit, which must in part be premised on its perception of whom it can effectively represent, should be considered by the Board as the most important factor in the ultimate determination of what is an appropriate bargaining unit.

16. The Board in establishing separate bargaining units for drivers and brokers would be acting in accordance with what is now a pervasive trend in policy. The employee status of the brokers intrudes into what the majority has termed “the legal shadow land between undisputable entrepreneurial and employment status set out in *Montreal v. Montreal Loco-*

motive Works Ltd. [1947] 1 DLR 161 (P.L.) and *Livingston Transportation Ltd.* [1972] OLRB Reps. 488, also fall into the category of what are called “dependent contractors”. (See Harry Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* 16 University of Toronto Law Journal B9.) Speaking broadly, a “dependent contractor” could be defined as a worker who, though he lacks some of the traditional characteristics of an employee, is economically dependent on one employer and is thus in need of the protection offered by collective bargaining. (See *NLRB v. Hearst Publications Inc.* (1944) 32 U.S. 111.)

17. Recently several Canadian jurisdictions have enacted “dependent contractor” provisions in their Labour Relations Statutes. One such provision is section 48 of the *British Columbia Labour Code*, S.B.C. 1973, c. 122 which was interpreted by Chairman Paul Weider in *Fownes Construction Co. Ltd.* (1974), 1 Canadian L.R.B.R. 453. In that decision, the Chairman stated that British Columbia’s “dependent contractor” provisions were inspired by the general body of thought favouring the extension of collective bargaining to “dependent contractors” that is constituted by, *inter alia*, the Arthurs article, (*supra*), case and the Woods Report. Indeed British Columbia’s sections were:

intended to be a condensation of the key features in the reasoning which lay behind the proposal to give dependent contractors access to collective bargaining. With that history in mind one can best understand the distinction of the “dependent contractor” and the nature of the special framework designed to incorporate that category within the ordinary administration of the code.

“Dependent contractors” in British Columbia are treated in a distinct way under section 48 for “dependent contractors” there can never constitute a separate bargaining unit but must be included in a bargaining unit with other employees. That unit, however, is certified initially without the presence of “dependent contractors” who are only included after certification. Moreover, the “dependent contractors” will only be included if *inter alia* “a majority of the dependent contractors consent to representation in the trade union”. Thus, if this case arose in British Columbia, the drivers would vote alone on certification and their wishes could not be frustrated by a numerically superior group of brokers. Moreover, the brokers would not be swept into collective bargaining unless a majority of their number desired it. This result is admirable because it preserves the collective freedom of two distinct groups of employees. British Columbia’s legislative scheme does not obtain in Ontario. However, this Board is at liberty to consider it and implement its results if we have sufficient jurisdiction under our own Act. We can validly do so in instances where British Columbia’s statutory provisions have derived from a policy which is as relevant to Ontario as to British Columbia. This case is such an instance. We can achieve the same result as would obtain in British Columbia without exceeding our jurisdiction. We should do so where an equitable and applicable policy demands it.

18. This view of what policy we should follow is reinforced by reference to the recently enacted “dependent contractor” provisions of our own Act which, of course, do not govern the instant application. We would do well, however, to heed the direction of the policy endorsed by the Legislature of this province. The new subsection 6(4) provides that a “unit consisting solely of dependent contractors shall be deemed ... appropriate”. However, the “Board may include dependent contractors in a bargaining unit with other employees if

the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit". Our Legislature, like its counterpart in British Columbia, has protected "dependent contractors" from being forced into a collective bargaining relationship by the vote of other employees. Surely this concern for freedom must also extend to the other employees, a group which is distinct from the "Dependent Contractors" in the view of the Legislature. It would be a capricious policy indeed that protected "dependent contractors" from being outvoted by other employees but left the other employees to the dictate of the "dependent contractors" if they happened to be in the majority. The lesson for the instant case is obvious. The equitable way in which to treat the drivers and the brokers is to create two separate bargaining units for which the Act gives us jurisdiction. Thus, the drivers, a distinct group of employees in this application, have chosen their own course. Likewise, the brokers will also be able to obtain collective bargaining rights if that is their collective desire as expressed by a majority of their number. This approach will promote the collective freedom of two distinct groups of employees and is in keeping with the policy of extending collective bargaining rights to "dependent contractors" which has been so recently adopted by the Legislature of this province.

19. The decision of the Canada Labour Relations Board in the *Byers Transport Limited* (1974) 1 Canadian LRBR 434 case serves as a precedent for the establishment of separate bargaining units for drivers and brokers.

20. For all these reasons I find that all employees of the respondent employed at and working out of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff, persons employed to drive vehicles not owned by the respondent and persons covered by subsisting agreements with the International Woodworkers of America, constitute a unit of employees appropriate for collective bargaining.

21. The evidence of membership in the applicant is sufficient for outright certification in the above unit. I therefore further find that a certificate issue to the applicant for the unit described in para. 20 hereof.

0836-75-U Modern Building Cleaning, A Division of Dustbane Enterprises Limited, (Applicant) v. John M. Askin, on his own behalf and on behalf of London District Building Service Employees Union, Local 220, (Respondents).

BEFORE: G. W. Adams, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: C. G. Riggs, E. A. Kieser and W. Benninger for the applicant; no one for the respondents.

DECISION OF THE BOARD: September 5, 1975

1. This is an application under *The Labour Relations Act*, R.S.O. 1970, Chapter 232, as amended by 1975, Chapter 76, Section 82.

2. Having regard to all of the evidence, the Board finds that the trade union, through its agent John M. Askin, has threatened to call an unlawful strike on September 8, 1975, of the employees of Modern Building Cleaning, A Division of Dustbane Enterprises Limited at the Sarnia General Hospital bargaining unit. The Board further finds that John M. Askin, an official of the trade union, has counselled and encouraged an unlawful strike to be held on September 8, 1975, by the above-mentioned employees.

3. As a result of these findings, the Board directs the trade union to refrain from threatening to call the unlawful strike. As well, John M. Askin is directed to refrain from counselling and encouraging the threatened unlawful strike.

4. The Board further directs that Alex Scrimgeour, Helen Grove and Arlene MacNeil – union committee members for the Sarnia General Hospital bargaining unit – and John M. Askin, president of the trade union, inform the employees in the bargaining unit that their threatened strike will be unlawful and that the trade union and John M. Askin do not support the said unlawful strike.

5. Copies of this decision are to be immediately posted at the work location by the applicant. The applicant is further directed to distribute copies of the decision to all of its employees as soon as is possible in the circumstances.

6. A copy of this direction shall be filed in the office of the Registrar of the Supreme Court.

7555-74-R International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. **Belmont Plastering Co.**, (Respondent) v. Marble Masons, Tile Layers, Terrazzo Workers Union 31, affiliated with the Bricklayers Masons & Plasterers International Union of America, (Intervener #1) v. Locals 48 and 117 O.P.C.M.I.A., (Intervener #2).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members E. Boyer and F. W. Murray.

APPEARANCES: *L. C. Arnold and S. Pantarotta appearing for the applicant; Ian Springate, Dino Morson, Chester DeToni and A' E. Golden appearing for Intervener #1; no one appearing for the respondent and Intervener #2'*

DECISION OF THE BOARD: August 29, 1975

1. This application for certification was filed on March 25, 1975. The applicant requested that a pre-hearing representation vote be taken. In a decision dated April 21, 1975, the Board directed the taking of a pre-hearing representation vote. This representation vote was conducted on May 1, 1975, and the ballot box was sealed. The ballots which were cast in the representation vote were counted on June 12, 1975. Voters had been given a choice between the applicant and intervener #1.

2. In a letter to the Board which was received on June 19, 1975, intervenor #1 acknowledged receipt of Form 46, Notice of Report of Returning officer and stated that it wished to make representations to the Board with respect to certain activities of the applicant and with respect to the conclusions that the Board should reach in view of the report. It was the contention of intervenor #1 that the results of the vote should be set aside because on or about April 30, 1975, Mr. Pantarotto and other representatives of the applicant spoke to the employees about the vote and that this activity violated the 72-hour silent period ordered by the Registrar.

3. The Board listed this matter for hearing and entertained the representations of the parties. Intervenor #1 conceded that its allegations regarding the violation of the 72-hour silent period were not filed on or before May 8, 1975, which is the date set forth in Form 45, Notice of Report of Returning Officer where the Board has directed that the Ballot Box be sealed. Intervenor #1 stated that it was aware of a possible violation of 72-hour silent period as early as May 26, 1975, and that it did not investigate this matter at that time. The Board conducted a hearing on June 11 and 12, 1975, with respect to the instant application and with respect to approximately twenty other similar applications. Form 46, Notice of Report of Returning Officer on Counting of Ballots, was served on the parties. June 19, 1975 was the date fixed in Form 46 for the filing of representations as to the accuracy of the report or as to the conclusions the Board should reach in view of the report. This is set forth in paragraph 2 of Form 46. The wording of Form 46 differs from the wording which is used in paragraph 3 of Form 45. Paragraph 3 of Form 45 states that "if you desire to make representations, (a) as to any matter relating to the representation vote; or (b) where a pre-hearing representation vote has been held in connection with the application; you shall send to the Board a statement of desire to make representations which shall.... Your statement of desire must contain a summary of the representations you wish the Board to consider."

4. In our view the conduct which intervenor #1 seeks to complain of is a matter which relates to the representation vote itself rather than to the accuracy of the report on the vote or to the conclusions the Board should reach in view of the report. Hence the allegations of intervenor #1 ought to have been filed with the Board within the time fixed in Form 45, namely, May 8, 1975. As the Board stated in the *Fleck Manufacturing Limited* case, 62 CLLC ¶16,236, it is incumbent on all parties to proceedings before the Board to investigate matters relevant to their cases as early as possible and if they intend to make allegations of improper or irregular conduct against another party to do so promptly. Intervenor #1 apparently made no effort to investigate the matters of which it complains until some four weeks after the alleged conduct occurred. Intervenor #1 stated at the hearing that it did not file its allegations until after the ballots were counted and it was known that the applicant had won the representation vote. In our opinion, allegations of improper or irregular conduct ought to be filed forthwith after a party has promptly investigated the events which give rise to such allegations. It is no answer, in the circumstances of this application, to wait for the outcome of the representation vote.

5. Intervenor #1 did not file its allegations of improper or irregular conduct within the time fixed in Form 45. In these circumstances and having regard to the foregoing, the Board will not permit intervenor #1 to adduce evidence in connection with its allegations of improper or irregular conduct.

6. The Board finds that the applicant is a trade union within the meaning of section 1(1) (n) of The Labour Relations Act.

8. Intervener #2 did not appear at the hearing. Having regard to the representations before it, the Board finds that intervener #2 does not have the status to intervene in this proceeding. Accordingly, the purported intervention of intervener #2 is dismissed.

9. Having regard to the decision of the Board in the *Canwall Contractors Limited* case, Board File #7516-74-R, decision dated July 2, 1975, and pursuant to the provisions of section 6(1) of The Labour Relations Act, the Board further finds that all plasterers and plasterers' apprentices of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

11. On the taking of a pre-hearing representation vote directed by the Board more than fifty per cent of the ballots were cast in favour of the applicant.

12. A certificate will issue to the applicant.

13. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0219-75-U Canadian Elevator Manufacturers, A Division of The Canadian Electrical Manufacturers Association, (Applicant) v. Barry McNeill, Reginald Kee, Douglas Gibbs, Robert Perro, Basil Saulnier, Ray Deane, Wayne Clough, William Rolfe, Richard Thomas and International Union of Elevator Constructors, Local Union 90, (Respondents).

BEFORE: George W. Adams, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: Richard Drmaj and Robert D. Suddard for the applicant; Stanley Simpson and Paul Lomas for the respondent.

DECISION OF GEORGE W. ADAMS, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES: September 26, 1975

1. This is an application for a consent to prosecute the respondents for their alleged violation of sections 63 and 65 of the *Labour Relations Act*.

3. The following is a statement of the material facts filed by the applicant:

The Applicant is a party to and bound by a Collective Agreement with the International Union of Elevator Constructors prepared and executed pursuant to Sub-section (7) of Section 4 of the Elevator Constructor Unions Disputes Act, 1973. The Collective Agreement is effective until the 31st day of March 1978.

The persons named in Schedule "a" hereto being employees of the Applicant and covered by such Collective Agreement went on strike commencing on March 3, 1975 and/or April 28, 1975 by failing to report for work at the commencement of their regularly scheduled shifts thereon, or to perform their regularly assigned duties on such day or at any time thereafter, or from time to time thereafter, without the approval or consent of the Applicant, Canadian Elevator Manufacturers and have since continued on strike.

4. The applicant chose not to call any evidence in support of its application but rather relied upon three earlier decisions of the Board between the parties arising out of the same factual situation. In the matters designated as Board Files Nos. 7425-74-U and 0217-75-U the Board declared that the respondent trade union called or authorized unlawful strikes commencing on March 3, 1975 and April 28, 1975, respectively. In the matter designated as Board File No. 0218-75-U the Board declared that Barry McNeill, Reginald Kee, Douglas Gibbs, Robert Perro, Basil Saulnier, Ray Deane, Wayne Clough and William Rolfe engaged in an unlawful strike on or about April 28, 1975. The applicant argued that, in light of these preceding determinations, the issue as to the unlawfulness of the respondents' actions on the days in question is *res judicata* and cannot now be contested. On the other hand counsel to the respondent trade union submitted that the doctrine of *res judicata* had no application in that the *res* or "thing" described in the earlier matters was not identical to the relief being sought in this application. He submitted that the doctrine of *res judicata* required identity in the thing sued for as well as identity of cause of action, of persons and parties to the action and of quality in persons for or against whom the claim is made. Alternatively, counsel submitted that the Board's power to give its consent to the institution of a prosecution is discretionary and that in the unique circumstances of this application consent ought not to be granted. In this regard he relied upon *Canadian Union of General Employees v. Toronto Western Hospital* [1972] OLRB Rep. Oct. 851.

5. Having regard to the authorities we find that the unlawfulness of the respondents' actions, save for the alleged actions of Richard Thomas, is *res judicata* or, phrased in another way, the respondents are estopped from contesting the unlawfulness of their actions by virtue of the Board's preceding decisions.

Black's Law Dictionary 1951 4th ed. – an American publication – supports the respondent trade union's understanding of *res judicata*. The definition found there reads:

Res judicata. A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. A phrase of the civil law, constantly quoted in the books. *Epstein v. Soskin*, 86 Misc. Rep. 94, 148 N.Y.S. 323, 324; Rule that final judgment or decree on merits by

court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit. *American S.S. Co. v. Wickwire Spencer Steel Co.*, D.C.N.Y., 8 F. Supp. 562, 566. And to be applicable, requires identity in thing sued for as well as identity of cause of action and of quality in persons for or against whom claim is made. *Freudenreich v. Mayor and Council of Borough of Fairview*, 114 N.J.L., 290, 176 A. 162, 163. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. *Massie v. Paul*, 263 Ky. 183, 92 S. W. 2d 11, 14. See, also, *Res Adjudicata*, *supra*.

However the reader is referred to the definition of estoppel where the heading “*Res Judicata Distinguished*” is found. And under that heading [at page 650] the editors of the publication distinguish *res judicata* from the “[d]octrine that issues decided may not be drawn in question in any future action between same parties or their privies, whether [the] cause of action in the two actions be identical or different...” They assert that this latter doctrine “is based on ‘estoppel’ rather than upon ‘res judicata’”. The note goes on to explain:

Doctrine that issues decided may not be drawn in question in any future action between same parties or their privies, whether cause of action in the two actions be identical or different, is based on “estoppel” rather than upon “res judicata”. *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E. 2d 67, 71, 74; in a later action upon a different cause of action a judgment operates as an “estoppel” only as to such issues in second action as were actually determined in the first action. *Lorber v. Vista Irr. Dist.*, C. C.A. Cal., 127 F. 2d 628, 634. The doctrine of “res judicata” is a branch of law of “estoppel” *Frisher v. McAllister*, 71 Ohio App. 58, 47 N.E. 2d B17, 819; the plea of “res judicata” is in its nature an “estoppel” against the losing party from again litigating matters involved in a previous action, but the plea does not have that effect as to matters transpiring subsequently. *Fort Worth Stockyards Co. v. Brown*, Tex. Civ. App., 161 S.W.2d 549, 555. Where a second action between same parties involves different cause of action, under doctrine of “res judicata”, judgment in first action operates as an “estoppel” only as to those matters which were in issue and actually litigated. *International Brotherhood of Electrical Workers v. Bridgeman*, 179 Va. 533, 19 S.E.2d 667, 670.

6. On the other hand the English jurisprudence appears to view the doctrine of *res judicata* as embracing both “cause of action estoppel” and “issue estoppel”, provided that the other basic elements of the doctrine are present. For instance, *Spencer-Bower and Turner (On Res Judicata*, 2nd Ed. (London: Butterworths, 1969)) have this to say on the operation of the two estoppels, at 1:

In English jurisprudence a *res judicata*, that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies. *The effect of such a decision is two-fold.*

In the first place, the judicial decision estops or precludes any party to the litigation from disputing, against any other party thereto, in any later litigation, the correctness of the earlier decisions in law and fact. The same issue cannot be raised again between them, and this principle extends to all matters of law and fact which the judgment, decree, or order necessarily established as the legal foundation or justification of the conclusion reached by the Court.

In the second place, by virtue of the decision the right or cause of action set up in the suit is extinguished, merging in the judgement which is pronounced. *Transit in rem judication*. The result is that no further claim may be made upon the same cause of action in any subsequent proceedings between the same parties or their privies. [emphasis added]

Sopinka and Lederman (*The Law of Evidence in Civil Cases*, (Toronto: Butterworths, 1974)), phrase the operation of the estoppels in the conjunctive, at 369, by writing:

...there can be estoppel with respect to the whole cause of action or to a single issue therein.

7. But be all this as it may the Board must still consider whether its discretion ought to be exercised in this case. In other words, even when the Board is satisfied that the applicant has adduced sufficient evidence to establish a *prima facie* case upon which a provincial court judge might find a violation of the Act (See *Hydro-Electric Power Commission of Ontario* [1974] OLRB Rep. Apr. 39; *A.L. Watson Limited* [1965] OLRB Rep. Sept. 436) the Board must go on to consider, as a matter of discretion, whether its consent should be given. Were it not for section 90 of the Act it would appear that an information and complaint could be laid by any person acquainted with the facts. The complainant would not have to show any special interest in the matters. Thus it was observed in *Steel Co. of Canada Ltd.* 47 CLLC 16,487 that section 90 “interposes the Board between the complainant and the court to ensure that complaints are not merely frivolous and vexatious and that the public interest (will) be served by a prosecution”. And a number of subsequent cases have gone on to elaborate the “public interest,” component of this observation in light of the Board’s role in a modern industrial community.

8. For example, in *E.S. Martin* 47 CLLC 16,504, the Board listened to a “most interesting and able argument” that a closed shop in effect constituted an unfair labour practice since the prime object was not union security but the boycott of another organization. The Board was not satisfied with the evidence but also observed that the prosecution procedure is not applicable to such breaches “involving as they do complicated technical considerations”. In effect the Board was saying that it was confronted with a labour relations problem that was unlikely to be resolved or to receive the requisite attention before an inferior criminal tribunal. This concern for the reality of labour relations is also evidenced in *Savage Shoes Limited* 53 CLLC 17,060 and *Arvo Tuomi* 53 CLLC 17,052. In *Savage Shoes* bargaining had been conducted by the union on behalf of the employees in two bargaining units at the same time, although formally the negotiations purported to relate only to one of the units. When a strike occurred in both units the employer applied for consent to prosecute. In denying its consent the Board wrote:

In these circumstances, should leave to prosecute be granted? Prosecution under The Labour Relations Act should not be a manifestation of retributive justice. Its sole purpose should be to further the ends which the Act was designed to serve. In connection with the situation here under consideration, the purpose lying behind the creation of the offence and the provision of a penalty is to ensure that a union will not call a strike until it has exhausted all avenues provided by the legislation for resolving its differences with the employer. In the instant case, it is apparent that, while there may have been no technical compliance, there was nevertheless substantial compliance with the legislation, a compliance in which the employer was not unwillingly involved. It takes little acquaintance with labour relations to appreciate that, in view of the understanding between the parties, strict compliance with the statute in this case would have resulted in nothing more than the parties "going through the motions". In view of these circumstances, it is our considered opinion that consent to prosecute should not be granted. The applicant is, of course, entitled to resort to whatever common law and statutory remedies, civil as well as criminal, there may be available to it apart from The Labour Relations Act. The Board's decision refusing leave to prosecute under that Act has reference only to the special limitations on the right to strike which the Act imposes.

In *Arvo Tuomi* an employer failed to inform both the trade union and its employees that it was no longer a member of an employers' association and for that reason not subject to a collective agreement between the association and the trade union. Some time later the employer suddenly revealed the fact to everyone and its employees ceased working when an expected pay increase was not forthcoming. The application was for a declaration and having regard to the purposes of that particular remedy the Board felt constrained to grant the relief. However, the Board outlined the position it would have adopted had the application been for a consent to institute a prosecution – a position that highlights the conduct of the employer. In this regard it wrote:

Having reached the conclusion that the employees went on strike, it is clear that the strike was in contravention of the provisions of section 49 of the Act, and it is immaterial whether the case comes within subsection 1 or subsection 2 of that section. Had the applicant sought leave to prosecute the employees for violating section 49 of the Act consideration would have had to be given to the employer's conduct. It seems to us that any reasonable employer who has had collective relations with a union over a period of years, as Tuomi had before he was expelled from the Exchange, must have been aware that the union would continue to deal with him in the belief that he were bound by an agreement. Since he did nothing to dispel that illusion, as the uncontradicted testimony of Peseau establishes, it would be inequitable to penalize employees who went on strike when their illusion was shattered and they found themselves without recourse to enforce what they felt were their legitimate rights.

9. In *Canal Cartage Ltd.* [1961] OLRB Rep. 251 the Board was confronted with a situation wherein the “ringleaders” of an unlawful strike had been discharged and the rest of the employees had resumed work. In refusing its consent the Board emphasized the following:

The Board is of the opinion, however, in view of the special circumstances of this case, including the short duration of the strike, the lack of a history of such occurrences, the absence of violence and the fact that the respondents have been discharged that no useful purpose would be served in the granting of its consent to institute a prosecution against the respondents.

10. Another variant of this approach is evidenced in *Hadley-Moulthrop Engineering Co. Ltd.* 54 CLLC 17,072 where the employer sought leave to prosecute a number of named employees who had participated in an unlawful strike. Those sought to be prosecuted had been picked at random from a list of striking employees. J. Finkleman (for the majority) stated:

Although there is no doubt that all the respondents, as well as other employees, engaged in the work stoppage, we believe, in the interests of the development of a sound industrial relations policy in this province, that it is unwise to permit the legislation to be used in such a fashion as to lead to some of the employees receiving preferential treatment in the matter of the prosecution for an infringement of the Act. Such a result would follow here if the Board consented to the prosecution of a number of employees chosen in the manner already indicated.

11. More recent illustrations of the approach – those found in *The Hydro-Electric Power Commission of Ontario* [1972] OLRB Rep. June 576 and *Toronto Western Hospital* [1972] OLRB Rep. Oct. 851 – emphasize a Board concern for the industrial relations relationship between the parties to the application. These cases demonstrate that the Board will refuse its consent where it believes that a prosecution is not a useful step in the resolution of the labour problems confronting the parties. In *The Hydro Electric Power Commission of Ontario* case it was tersely stated that the Board’s “sole function...is to determine whether, by granting its consent, it will advance the purpose and intent of the Act and thereby promote a sound relationship between the parties”. This view was elaborated in *Toronto Western Hospital* where the majority concluded that section 90 allowed “the Board to determine from its special viewpoint, the value, if any, that might accrue to the parties specifically as well as to the public generally in the area of industrial relations by permitting the dispute in question to be determined on the purely legal basis of the guilt or innocence of an accused in a quasi-criminal trial”. Applying this perspective to the facts confronting it, the majority, in *Toronto Western Hospital*, concluded that to grant its consent “would only be to provide another rostrum and another arena for the prolongation of the whole dispute”.

12. A review of these cases therefore amply demonstrates that the role of the Board under section 90 goes well beyond the determination of a *prima facie* case or the vexatiousness of an application. Section 90 provides an industrial relations perspective to what would otherwise be an ordinary criminal matter– a matter emphasizing the rule of law. In other words, the Legislature has recognized that the resolution of labour relations problems often

requires something more sophisticated than the punitive enforcement of statutory provisions. As those in the field appreciate successful labour relations embrace delicate social relationships. This same reality therefore requires flexibility in the administration and enforcement of labour laws.

13. In the facts at hand – facts described in detail in a decision dated April 16, 1975 (Board File No. 7425-74-U) – we do not believe that the labour problem confronting the parties to this application can be resolved or in any way ameliorated by a criminal prosecution. The problem arises in a complicated, longstanding and important relationship between two parties – the Canadian Elevator Manufacturers (hereinafter referred to as the “employer association”) and the International Union of Elevator Constructors Local 90 (hereinafter referred to as the “trade union”). Prior to 1972 the collective agreement between the parties was administered on an industry-wide basis and required the employers to terminate the employment of any employee who failed to obtain or maintain membership in the union. Unsurprisingly, it obligated all mechanics and helpers, as a condition of employment, to obtain and maintain membership in the union. However, this industry-wide hiring hall procedure was qualified by a “permit system” The permit system was described in the Board’s earlier decision (Board File No. 7425-74-U) in the following way:

Article III of the former collective agreement indirectly required an employer to make a request to a local union office when it required an employee. If there was a union member available (hereinafter referred to as “card holder”), he would be sent; if not, the union would attempt to supply persons from amongst non-members who had previous experience. These latter persons were designated as “permit holders” in that the local union would issue permits to them to authorize their employment with the employer, despite their non-union membership status (otherwise a status that would be contrary to Article III). If the union was unable to supply either members or former permit holders, the employer was free to go to other sources, so long as the person selected was referred to the union to obtain a permit before reporting to the job. The evidence establishes that a permit was issued to a person for a specified period of time, usually one month, and that it had to be renewed for each succeeding period. Furthermore, the issuance of a permit required the payment of specified amount of money by the person thereby authorized to work. During the first six months of employment a permit holder paid \$12.00 per month (a period during which he was designated as a probationary helper under the collective agreement – see Article X Par. 3), and thereafter he paid \$14.00 per month. This money was conveyed directly by the permit holder to the local union by cheque or money order.

Moreover, permits not only permitted persons without union membership to work in the industry, they also identified those persons whom, on an industry-wide basis, card holders or union members could (bump or) displace when laid off.

14. In 1972 a costly industry shutdown arose during the negotiations between the parties and the Government of Ontario enacted the *Elevator Constructor Unions Disputes*

Act, S.O. 1973, c. 1, requiring the International Union of Elevator Constructors, its Ontario Locals (including the respondent trade union) and five elevator companies to submit their differences to final and binding arbitration. As a result of certain provisions contained in the collective agreement prescribed by the board of arbitration constituted by the legislation, the employer has taken the position that the permit system has been eliminated and replaced by a seniority system that operates on a company-wide, as opposed to an industry-wide basis. These new provisions read:

ARTICLE III

Membership Requirements

Par. 1. An Elevator Contractor Mechanic or an Elevator or an Elevator Contractor Helper covered by this Agreement shall, as a condition of employment, obtain and maintain membership in a Local Union of the I.U.E.C. on and after the thirtieth (30th) day following the beginning of his employment or the date this Article becomes effective, whichever is later.

Par. 2. The Employers shall be obligated under this Article, after it becomes effective as above provided, to terminate the employment of any employee who fails to obtain or maintain membership in a Local Union as required by this Article, upon receipt of a written request for such termination from his Local Union; except that the Employers shall have the right to refuse such request if they have reasonable grounds for believing (1) that such membership is not available to the employee on the same terms and conditions generally applicable to other members, or (2) *that membership has been denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.* [emphasis added]

ARTICLE X(A)

Employment, Layoff and Recall

Par. 1. A Joint Employment Committee comprised of an equal number of employer representatives from the industry and from the Local Union shall be appointed in each locality.

Par. 2. The primary purpose of the Committee shall be to establish and keep current an open list of individuals who are fully qualified to perform the work required in the industry, or who are being trained in the work of the industry, or who have apparent potential for such training. This open list shall be established and kept current on a nondiscriminatory basis and without regard for membership in the Union' The Joint Employment Committee (co-ordinating its work with the Education Committee, the Joint Examining Committee and with government and outside educational agencies as it deems advisable), shall develop

policies and procedures designed to attract and retain a competent and stable workforce in the industry.

Par. 3. An Employer shall use the Local Union as a first source of job applicants. In the event that the Local Union is unable to satisfy satisfactorily the Employer's request within forty-eight (48) hours, the Employer may obtain applicants from any other available source. The Employer has the right to reject any applicant referred to him by the Local Union, however, a claim that the Employer has unreasonably rejected such an applicant may be the proper subject matter of a grievance.

Par. 4. The Employer may lay off or discharge a Probationary Helper at any time during the probationary period and no such lay off or discharge shall be the proper subject matter of a grievance.

Par. 5. Seniority of an employee is his total length of service in the industry in Ontario and shall be recorded in the open list provided for in Par. 2 above. Seniority shall not accumulate during a layoff and Seniority shall be deemed to be broken if the employee does not have three (3) months service within the preceding twelve (12) months.

Par. 6. In the event that lack of work requires a reduction in the workforce, employees shall be laid off in the following order:

- (a) Probationary Helper,
- (b) Helper having less than two (2) years seniority within the preceding three (3) years, and without regard to seniority,
- (c) Helper having two (2) years or more of seniority within the preceding three (3) years,
- (d) Mechanic.

Par. 7.

(a) Provided the necessary skill and ability to do the work exists, the Helper having the lesser or least seniority shall be the first to be laid off in applying Par. 6(d) above. Provided the necessary skill and ability to do the work exists, the Mechanic having the lesser and least seniority shall be the first to be laid off in applying Par. 6(d) above.

(b) A Helper working at an overtime job site may not be bumped by an employee from a different job site for the purpose only of working overtime.

Par. 8. The recall of employees shall be in the reverse order of the lay offs made in accordance with the provisions of this Article.

Par. 9. It is recognized that it will take some time for the parties to establish a Joint Employment Committee in each locality and for the Committee to develop the necessary practices and procedures. Therefore, the provisions of this Article shall become effective as of September 1st, 1974, or an earlier date if the parties agree. In the meantime, existing practices shall continue in effect.

Par. 10. In the event that the Joint Employment Committee is unable to develop workable practices and procedures, the matter shall be referred to the Joint Industry Committee which shall have the authority to amend, modify or make substitutions for the provisions of this Article and to establish the practices and procedures which will apply, provided, however, that the principles of seniority set forth in this Article are retained. If the Joint Industry Committee fails to resolve the matter and arbitration is required, the Impartial Arbitrator shall have the same authority as the Joint Industry Committee.

15. Further, the employer members of the applicant have acted on this view of these provisions by requesting "permit men" in their employ to continue working despite the failure of the respondent trade union to renew their permits. The employers also refuse to employ "card holders" or union members when their employment would require the displacement or bumping of "permit men".

16. On the other hand, the respondent trade union has adopted at least three converse versions of the new collective agreement which can be reviewed briefly. Its first position is that Article III is not intended to abolish the permit system. The permit system operated outside of the former collective agreement and thus it submits that there is no reason in law or logic that it should not continue to exist outside the framework of the current agreement.

The second version depends upon the interpretation of Article 10, para. 9. It submits that para. 9 expressly continues the permit system until September 1, 1975 and implicitly continues it after that date if the parties have not been able to create the necessary framework for its replacement – a framework specified in the preceding paragraphs of Article X. Thus if this interpretation is adopted the permit system would continue until either the Joint Industry Committee or the Impartial Arbitrator, referred to in para. 10, has resolved the outstanding matters. This interpretation is supported by a fair measure of common sense when one has regard to longstanding history of the permit system. Without a replacement structure in place, the overnight elimination of the permit system could be viewed as a drastic step not intended by the board of arbitration that drafted para. 9.

The final position of the respondent trade union – a position that was not submitted as an alternative to the first two submissions – is that Article X envisages a seniority system administered on an industry-wide basis – not a company-wide system. The permit system has been an industry-wide phenomenon and para. 5 of Article X defines an employee's seniority as his total length of service in the *industry*. On the other hand, the members of the applicant organization have rejected this interpretation preferring to rely upon the reference in para. 3 and para. 4 of Article X to employer, in the singular.

17. As the earlier decisions of this Board suggest, both parties – since September 1, 1974 – have acted in accord with their respective but conflicting interpretations. Furthermore, the individuals named in Schedule A to this application – former permit holders – have been caught in the middle of these vector-like forces. The employers have directed them to work and the trade union has revoked their permits because of the recent availability of union members due to a general slowdown in the industry. Moreover, on these occasions when the permit men have attempted to continue working the union members employed by the applicant's members have refused to work with them.

18. All of these considerations suggest that the problem confronting this collective bargaining relationship is not going to be resolved by a prosecution launched in an inferior court of criminal jurisdiction. The parties are confronted with a very difficult and complex labour problem that can most appropriately be resolved by way of grievance arbitration or by mutual accommodation and compromise. No evidence was adduced that these avenues are not open to the parties or that they are inadequate. Furthermore, the applicant has already obtained a declaration and a cease and desist order in respect to the respondent trade union's actions and the applicant did not establish that these remedies have proven inadequate. Finally, the applicant has not proceeded against all of the "permit men" and does not seek to prosecute any of the trade union members who refused to work with the "permit men". The applicant indicated that its failure to proceed against all of the permit men was premised on the apparent adequacy of the Board's earlier cease and desist order but we would note that Wayne Clough is subject to that order and named in the instant application as well. More importantly no explanation was given for the applicant's failure to proceed against the union members who refused to work with the permit men. The Board is on record that it will not consent to the institution of a prosecution on a discriminatory basis.

19. For all of these reasons the application is dismissed.

DECISION OF BOARD MEMBER J.D. BELL:

1. I dissent.

2. I agree with the majority of the Board that we exercise our discretion and not grant consent to prosecute Barry McNeill, Reginald Kee, Douglas Gibbs, Robert Perro, Basil Saulnier, Roy Deane, Wayne Clough, William Rolphe, Richard Thomas for their alleged violation of section 63 of *The Labour Relations Act*.

3. There is no doubt these individuals are caught in the middle of this dispute between the respondent union and the applicant.

4. The decision of the respondent union officials to revoke the work permits of these individuals is the action that triggered this confrontation and placed them in an untenable position.

5. However, I would grant consent to prosecute the International Union of Elevator Constructors, Local Union 90 for its alleged violation of section 65 of *The Labour Relations Act*. A *prima facie* case has been established. There is an arguable point of law that should be decided by a provincial court. There are no extenuating circumstances such as in the case of the named individuals that would cause me to exercise my discretion and refuse such consent.

6. I find it difficult to understand how the majority can state that this case can only be resolved by arbitration or by mutual accommodation and compromise and deny consent on this reason alone. This was not the question before the Board. Such decisions on which procedure to follow should be left to the parties and the Board should confine itself to the question at hand.

7. I would grant consent to prosecute the respondent trade union for its alleged violation of section 65 of *The Labour Relations Act*.

0687-75-R Amalgamated Jewelry and Allied Trades Workers Union, Local 33, I.J.W.U., (Applicant) v. **Marvel Jewellery Limited and Danbury Sales (1971) Ltd.**, (Respondent).

BEFORE: D.D. Carter, Vice-Chairman, and Board Members O. Hodges and J.E.C. Robinson, Q.C.

APPEARANCES: *P.J. Pape, T. Kuttner, C. Gies for the applicant; S.L. Goldenberg for the respondent.*

DECISIONS OF THE BOARD. September 26, 1975

1. This is an application under section 55 of the *Labour Relations Act* alleging a sale of a business by Marvel Jewellery Limited (which will be referred to as Marvel) to Danbury Sales (1971) Ltd. (which will be referred to as Danbury). The applicant seeks a declaration that Danbury is bound by the collective agreement to which Marvel was bound prior to the sale. In its reply, the respondent denies that a sale of the business has occurred and, alternatively, seeks a declaration terminating the bargaining rights of the applicant because the business had changed its character so as to be substantially different from the business of the predecessor employer.

2. The dispute in this case centres upon a series of transactions occurring after Marvel ran into financial difficulties in late 1974. At that time the operation of Marvel was run by two brothers, Irving and Nathan Hennick, who were the principal officers of the company. The company, which produced precious metal jewelry, was a member of the Toronto Jewellery Manufacturers' Association (which will be referred to as the Association). The Association was a party to a collective agreement with the applicant and Marvel, as a member of the Association, was bound by the agreement. This agreement, running from October 24, 1923 to June 30, 1976, covered the production employees of the Association's members.

3. Marvel's financial problems stemmed from an obligation incurred by its parent company, Marvel-Hemsley Ltd. The latter company had become heavily indebted to the Continental Financial Corporation, a debt which Marvel had guaranteed through debentures given to the creditor. As the result of a default on the debentures, occurring in November, 1974, an interim receiver-manager was appointed by the Court on February 21, 1975, to run Marvel. The receiver-manager assumed control of Marvel's operations as of that date.

although Irving and Nathan Hennick remained as advisors. The manufacturing operations continued after February 21 as the receiver sought to sell Marvel as a going concern. The only change in operations was that additional raw material was only purchased where it was necessary to complete new orders. The efforts to sell the business as a going concern were not successful, so that, in June, the receiver attempted to sell the assets of the business by tender, offering buyers the opportunity to purchase either some or all of the assets of Marvel. This procedure, however, did not result in a sale as the receiver considered all offers received as unacceptable. By the end of June, the receiver had determined that Marvel should discontinue its manufacturing operations since the completion of new orders would require the acquisition of too much raw material. In a letter dated July 1, 1975, the receiver informed the employees that the manufacturing plant would close immediately and would remain closed until further notice.

4. The next set of transactions occurred in early July. On July 4, Danbury, whose initial tender was rejected, made a second offer proposing different terms. This offer was accepted by the receiver and approved by the court on July 18, 1975. The result of this transaction was that Danbury ended up purchasing Marvel's stock of raw materials, its inventory, its office equipment, factory equipment, and the lease covering the premises at 6 Tippet Road, Downsview. In addition, Danbury acquired the right to collect both wholesale and retail accounts receivable.

5. Danbury, however, was merely the nominal purchaser, the real purchaser being a partnership of Danbury and Shirene Holdings Ltd. (which will be referred to as Shirene). This latter company, the shares of which were owned by the wives of Irving and Nathan Hennick, was effectively controlled by the two Hennick brothers. The principal asset of Shirene, prior to the purchase from the receiver, was its ownership of the property at 6 Tippet Road. The agreement between Danbury and Shirene, dated July 4, 1975, acknowledges that the July tender was submitted by Danbury on behalf of Danbury and Shirene as partners, the exception to the partnership arrangement being parcels 6, 7 and 8, which parcels included the office equipment, the factory equipment and the factory lease. The offer, as it related to these three parcels, was to be submitted on behalf of Shirene alone and, if accepted, Shirene was obligated to pay Danbury on or before the termination of the partnership the sum of \$132,500, the purchase price for these parcels. An important condition of the partnership arrangement was that Danbury was to control all the operations of the partnership and all proceeds of the sales by the partnership up to \$1,000,000 plus operating expenses and purchases actually paid by Danbury. The partnership was to pay and bear the expenses incurred for wages, salaries, utilities, purchases and other proper operating costs but no salary or wages were to be paid to Bernard Weinstein and Harvey Rich of Danbury, or to the two Hennick brothers. Under the arrangement Shirene and Danbury were to share any losses in equal shares and divide profits according to a sliding scale. Apparently, the Hennicks took the initiative in making this arrangement in order that a higher price could be realized by the receiver, which in turn would reduce their personal liability to Contental Financial Corporation. Irving Hennick testified that the provision of the Hennicks' services at no salary was an important inducement in attracting Danbury as a partner in the arrangement.

6. Manufacturing operations at 6 Tippet Road recommenced on July 21, although the scope of production was less extensive, being confined to rings and necklaces. Some new material was purchased for this operation, but it would appear that the purpose was to turn

the raw materials on hand immediately into finished goods, rather than waiting to fill orders as was the case prior to the sale. Special discounts were then offered to the retailers to induce them to buy from the inventory of finished goods. Management and production employees who had worked for Marvel prior to July 1 continued to work at the plant after the recommencement of the operation on July 21. The number of persons employed after this date, however, was less because of the reduced scope of the operations.

7. The applicant argued that in this type of case, once a *prima facie* case of a sale has been made out, the onus of proof then shifts to the respondent who is required to establish that a business was not the subject of the sale. In this case, we do not consider it necessary to deal with this argument. Section 55(13) of the Act requires the respondents to “adduce at the hearing all facts within their knowledge that are material to the allegation”. In this case, the respondent fulfilled that obligation in a frank and forthright manner by providing full details of the transactions that occurred. As a result, we consider that there is sufficient evidence before us to decide this matter without determining the location of the onus of proof.

8. The primary issue in this case is whether the transaction between the receiver and the Danbury-Shirene partnership amounted to the sale of a business, and not just the sale of a bundle of discrete assets. Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

9. The question in each case is whether there has been a transfer of the functions carried on prior to the sale or, put more simply, whether there has been a continuation of the business. This question must be answered by examining the totality of the transaction, and not just by glancing at the outward form of the transaction. Some of the factors taken into account, as set out in *Thorco Manufacturing Ltd.* (1965), 65 C.L.L.C. para. 16,052 at p. 787, are “the nature of the business, the reason for and the purpose of the transaction, the position of the parties, the bargain sought to be effected by the transaction”.

10. In this case, we conclude that the sale by the receiver to the Danbury-Shirene partnership constituted a sale of a business. Although the formal transaction may have given the appearance of a sale of assets, the assets were purchased as a block, giving the partnership the option of either liquidating immediately or continuing to run the business on a reduced scale until inventories were depleted. It is clear that this latter course of action was followed, partly because it was likely to realize more money and partly because it offered to the Hennick's the possibility of reviving the Marvel operation after inventories were liquidated.

11. Respondents argued that the partnership had acquired no good will, either in the form of a restrictive covenant, acquisition of the trademark or logo, or acquisition of existing contracts or orders, indicating that the business was not being carried on by the partnership. The facts, however, do not support this contention. The new concern continued to manufacture rings using the Marvel logo, and it would appear that, for certain purposes, it continued to play upon the Marvel name by using the name “Danbury-Marvel” to identify

the partnership. The two principal officers of Marvel, the Hennick brothers, and many of the former management were involved in the operation of the partnership. As a result, the partnership retained a considerable amount of Marvel's goodwill, knowledge and expertise. In addition, the new concern acquired the right to collect Marvel's wholesale accounts receivable, which provided it with a means of retaining contact with Marvel customers. Nor do we consider that Marvel's goodwill was dissipated during the three-week shutdown that occurred in July, this shutdown being far too short to break the continuity of the business operation.

12. The fact is that the business continued to operate after the sale occurred. The same goods were being produced by the same employees, the only difference being a reduction in the scope of the operation. Although Danbury and Shirene may have had somewhat different reasons for continuing the operation, Shirene being more concerned about reviving the business once it had been rundown, these different motives do not subtract from the fact that the partnership continued to run the same business as was carried on by Marvel prior to the sale. We, therefore, conclude that there was a sale of the business to the Danbury-Marvel partnership.

13. Accordingly, we declare that the partnership of Danbury Sales (1971) Ltd. and Shirene Holdings Ltd. is bound by the collective agreement between the Amalgamated Jewellery and Allied Trades Workers Union, Local 33, IJWU, and the Toronto Jewelry Manufacturers' Association, now in existence.

14. Finally, we will deal with the respondent's request for a declaration under section 55(5) of the Act terminating the bargaining rights of the applicant. Under this section, the Board may terminate the bargaining rights of a trade union, if in its opinion, "the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer". The respondent argued that the character of the operation had changed, being no longer a going concern but a business in the process of being liquidated. In our opinion, the character of a business does not change just because the scope of its operation has decreased. The business run by the partnership is still producing the same product, jewelry, nor has it changed in such a way as to require employees with skills different than those employed by the predecessor employer. In fact, the successor employer continued to use the former employees of Marvel in order to carry out its production. In these circumstances, the Board must conclude that there is no change in the character of the business, and that it should not exercise its discretion under subsection 5.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1975

Application for Certification

BARGAINING AGENTS CERTIFIED

No Vote Conducted

(Inadvertently Deleted from July 1975 Monthly Report).

5389-73-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dineen Roads & Bridges Limited (Respondent) v. Labourers International Union of North America, Local 607 (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

(Inadvertently Deleted from July 1975 Monthly Report).

5584-74-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dineen Roads & Bridges Limited (Respondent) v. Labourers International Union of North America, Local 607 (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (not stated employees in the unit).

5668-74-R: Labourers' International Union of North America Local 493 (Applicant) v. Bermingham Construction Limited (Respondent).

Unit: "all employees of the respondent engaged in pile driving within a radius of 35 miles from the City of Sudbury Federal Building, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by subsisting collective agreements between the respondent and Labourers' International Union of North America, Local 183; United Brotherhood of Carpenters and Joiners of America, Local 18; and International Union of Operating Engineers, Local 793." (not stated employees in the unit). (*Having regard to the agreement of the parties*).

6616-74-R: Windsor Electrical Contractors Association (Applicant) v. International Brotherhood of Electrical Workers, Local Union 773 (Respondent).

Unit: "all employers of journeymen electricians and apprentices for whom the respondent has bargaining rights in the County of Kent in the industrial, commercial and institutional sector and in the residential sector." (no employees in the unit). (*Having regard to the representations before it*).

6617-74-R: Windsor Electrical Contractors Association (Applicant) v. International Brotherhood of Electrical Workers, Local Union 773 (Respondent).

Unit: "all employers of journeymen electricians and apprentices for whom the respondent has bargaining rights in the County of Essex in the industrial, commercial and institutional sector and in the residential sector." (no employees in the unit). (*Having regard to the representations before it*).

7033-74-R: Labourers' International Union of North America, Local 183 (Applicant) v. Campeau Corporation (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent, engaging in cleaning and maintenance at Harbour Square Apartments located at 33 Harbour Square, Toronto, save and except supervisors, persons above the rank of supervisor, lifeguards, security guards, office and clerical staff." (11 employees in the unit). *Having regard to the agreement of the parties*).

0165-75-R: Canadian Union of Public Employees (Applicant) v. Sudbury and District Health Unit (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent save and except the Medical Director, the Secretary to the Medical Director, the Business Administrator, the Secretary to the Business Administrator, Dental Director, Secretary to the Dental Director, Director of Nursing, Secretary to the Director of Nursing, the Assistant Director of Nursing, the Director of Public Health Inspectors, Secretary to the Director of Public Health Inspectors, Chief Public Health Inspector, Senior Public Health Inspectors, and persons above those ranks, employees who are regularly employed for not more than 24 hours per week, students hired for the school vacation period, and all those covered by a subsisting collective agreement between the respondent and the Ontario Nurses' Association." (58 employees in the unit). (Bargaining Unit #2 – See Certification Dismissed Subsequent to Post-Hearing Vote).

0289-75-R: Ontario Nurses' Association (Applicant) v. The Spence Clinic (Respondent).

Unit: "all registered and graduate nurses employed by the respondent at Thunder Bay engaged in a nursing capacity." (3 employees in the unit).

0299-75-R: Ontario Nurses' Association (Applicant) v. The Corporation of the County of Renfrew (Respondent).

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by the respondent at Bonnechere Manor in Renfrew, save and except the Assistant Director of Nursing and persons above the rank of Assistant Director of Nursing." (16 employees in the unit).

0313-75-R: United Cement, Lime and Gypsum Workers International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Indusmin Limited (Respondent) v. Employee (Objector).

Unit: "all office employees of the respondent in the Township of Methuen, save and except foremen, office manager and persons above the rank of foreman and office manager." (4 employees in the unit).

0465-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Asar Investments Limited and Jersey Construction Co. Limited operating business under the name of Goldfield Holdings (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at Milo Park Gardens in Toronto." (2 employees in the unit).

0561-75-R: United Steelworkers of America (Applicant) v. Secord Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its manufacturing plant at Hamilton, Ontario, save and except the plant manager, persons above the rank of plant manager, office and sales staff." (16 employees in the unit).

0629-75-R: The Civil Service Association of Ontario (Inc.) (Applicant) v. The Board of Governors of The Ontario Institute for Studies in Education (Respondent) v. Group of Employees (Objectors).

Unit: "all research officers employed by the Board of Governors of the Ontario Institute for Studies in Education who hold a regular full time, regular part time, sessional full time, sessional part time or temporary appointment." (119 employees in the unit). (*Having regard to the agreement of the parties*).

0669-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of York (Respondent).

Unit: "all psychologists, assistants in psychology, social workers and attendance counsellors employed by the respondent in the Borough of York, save and except senior psychologists, senior social workers, persons above the rank of senior psychologist and senior social worker and persons regularly employed for not more than 24 hours per week." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0670-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for Metropolitan Toronto (Respondent).

Unit: "all psychologists and assistants in psychology employed by the respondent, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0671-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of Scarborough (Respondent).

Unit: "all psychologists, assistants in psychology and social workers employed by the respondent in the Borough of Scarborough, save and except chief psychologists and chief social workers, persons above the rank of chief psychologist and chief social worker, attendance counsellors, and persons regularly employed for not more than 24 hours per week." (26 employees in the unit). (*Having regard to both the agreement of the parties*).

0692-75-R: Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Bruce Fuels Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Ottawa, Ontario, engaged as oil burner servicemen and truck drivers save and except foremen, persons above the rank of foreman, office and sales staff," (5 employees in the unit).

0699-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. B G Checo Engineering (Ontario) Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 353 (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation

of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). *Having regard to the foregoing*.

0707-75-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Catalano Product Ltd. (Respondent).

Unit: “all employees of the respondent at Windsor, Ontario save and except foremen, persons above the rank of foreman, office and sales staff.” (6 employees in the unit). *Having regard to the agreement of the parties*).

0714-75-R: Labourers’ International Union of North America; Local 183 (Applicant) v. Rocchi Construction Co. Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

0721-75-R: Ontario Nurses’ Association (Applicant) v. Kemptville District Hospital (Respondent).

Unit #1: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kemptville, save and except the Director of Nursing, persons above the rank of the Director of Nursing, Head Nurses, and persons who are regularly employed for not more than 24 hours per week.” (16 employees in the unit).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent at Kemptville who are regularly employed for not more than 24 hours per week, save and except the Director of Nursing, persons above the rank of the Director of Nursing and Head Nurses.” (10 employees in the unit).

0725-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gorf Contracting Limited (Respondent) v. Group of Employees (Intervener).

Unit: “all employees of the respondent within a fifty mile radius of the Timmins Federal Building engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

0735-75-R: Textile Workers Union of America, AFL-CIO-CLC (Applicant) v. Cornwall Spinners Limited (Respondent).

Unit: “all employees of the respondent at Cornwall, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, shipper-receiver, store keeper, laboratory staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (67 employees in the unit). *(It was noted that the exclusions from the bargaining unit defined above are in accordance with the agreement of the parties. There is a dispute with respect to the inclusion in or exclusion from the bargaining unit of maintenance staff. The Board finds that maintenance staff are included in the bargaining unit.)*

0742-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW (Applicant) v. Charles Laue Limited (Respondent).

Unit: "all employees of the respondent in Windsor save and except foremen, persons above the rank of foreman, office and sales staff." (29 employees in the unit). (*Having regard to the agreement of the parties*).

0745-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bechtel Canada Limited (Respondent).

Unit: "all employees of the respondent in the County of Lambton engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0748-75-R: Service Employees Union, Local 204, affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Baycrest Hospital and Jewish Home for the Aged (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, professional medical staff, payroll officer, persons employed in the personnel department in a confidential capacity relating to labour relations, staffing co-ordinator-hospital, staffing co-ordinator-Jewish Home for the Aged; secretaries to the following: director of nursing (hospital), director of nursing (home), administrators, assistant administrators, associate administrator, comptrollers, chief of staff and executive director, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students employed in a co-operative training programme and persons covered by subsisting collective agreements or persons covered by a certificate issued by the Ontario Labour Relations Board to the Civil Service Association of Ontario (Inc.)." (64 employees in the unit). (*Having regard to the foregoing and to the agreement of the parties*).

0763-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hoffman Concrete Products Limited (Respondent).

Unit: "all office and sales employees of the respondent in the Township of Petawawa, Ontario save and except office manager, those above the rank of office manager and personal secretary to the owners, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (not stated employees in the unit).

0772-75-R: Toronto Printing Pressmen & Assistants Union Local 10, Subordinate to International Printing and Graphic Communications Union (Applicant) v. Rainbow Thermographers Company (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office staff, students employed during the school vacation period and persons covered by subsisting collective agreements." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0778-75-R: United Steelworkers of America (Applicant) v. Liquid Carbonic Canada Ltd./Ltee. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Paris, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in the unit). (The Board noted that there were

no students employed by the respondent at its plant in Paris, Ontario nor has there been a history of employing students at that plant. The Board therefore finds that appropriate bargaining unit ought not to exclude "students employed during the school vacation period". (See: **Dominion Glass Company Limited** case OLRB M.R. December 1970 935; **Port Hope Ready Mix Company** OLRB M.R. May 1971 263).).

0781-75-R: Canadian Union of Public Employees (Applicant) v. The Guelph Public Library Board (Respondent) v. Employee (Objector).

Unit #1: "all employees of the Guelph Public Library Board in the City of Guelph, save and except the Chief Librarian, the department head of the Children's Services, the supervisor of Bookmobile Service, the secretary to the Chief Librarian, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (15 employees in the unit).

Unit #2: "all employees regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit).

0785-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Airport Special Delivery Service Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen and dispatchers, persons above the rank of foreman and dispatcher, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (28 employees in the unit). (*Having regard to the agreement of the parties*).

0788-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Enzo Haulage & Excavation Ltd. (Respondent).

Unit: "all employees of the respondent at Hamilton, Ontario save and except foremen, dispatchers, those above the rank of foreman, dispatcher, office and sales staff." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0793-75-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Standard Brands Canada Limited (Respondent).

Unit: "all employees of the respondent at 1075 Ellesmere Road, Scarborough, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, laboratory technicians, persons employed for not more than 24 hours per week and students employed during the school vacation period." (85 employees in the unit). (*Having regard to the agreement of the parties*).

0795-75-R: Amalgamated Clothing Workers of America (Applicant) v. Kraven Knitting Limited (Respondent).

Unit: "all employees of the respondent at Stratford, Ontario save and except foremen and foreladies, persons above the rank of foreman and forelady, supervisors, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (28 employees in the unit).

0799-75-R: Local Union 636 The International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C. (Applicant) v. RCA Limited (Respondent).

Unit: "all employees of the respondent engaged as commercial systems technicians and installers working at or out of Port Credit, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit).

0800-75-R: Ontario Nurses Association (Applicant) v. South Huron Hospital Association (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at Exeter for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor." (9 employees in the unit).

0803-75-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Mount Pleasant Cemetery (London) Inc. (Respondent).

Unit: "all employees of the respondent at London, save and except supervisors, persons above the rank of supervisor, and office staff." (9 employees in the unit).

0805-75-R: Christian Labour Association of Canada (Applicant) v. Hexamer Electric Ltd. (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0809-75-R: International Association of Machinists and Aerospace Workers (Applicant) v. Martonair (Canada) Limited (Respondent).

Unit: "all employees of the respondent at Mississauga, save and except foremen, persons above the rank of foreman, office, clerical and technical staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

0812-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Karal Thear Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0814-75-R: Canadian Food and Allied Workers Local Union 633, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Amherstburg IGA Store No. AJ-269 (Respondent).

: "all meat department employees of the respondent at its retail stores at Amherstburg, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in the unit).

0815-75-R: Canadian Food and Allied Workers Local Union 175, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Amherstburg IGA Store No. AJ-269 (Respondent).

Unit: “all employees of the respondent at its retail stores in Amherstburg, save and except meat department employees, store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in the unit).

0816-75-R: Canadian Food and Allied Workers Local Union 175, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Amherstburg IGA Store No. NJ-269 (Respondent).

Unit: “all employees of the respondent at its retail stores in Amherstburg regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in the unit).

0818-75-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. K. Forma (Respondent).

Unit: “reinforcing rodmen in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0829-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Sub-Strata Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

0830-75-R: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Schep Contracting Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit). (*Having regard to the foregoing*).

0840-75-R: International Association of Bridge, Structural & Ornamental Ironworkers Local 759 (Applicant) v. Crittal Construction Ltd. (Respondent).

Unit: “all reinforcing rodmen in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0841-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Limerick Carp. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto; The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the

County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0842-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fantin Bros. Carpenters (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (7 employees in the unit).

0843-75-R: Hotels, Clubs, Restaurants and Taverns Employees’ Union, Local 261 (Applicant) v. Inn of the Provinces (Respondent).

Unit: “all employees of the respondent at the Inn of the Provinces Hotel, 360 Sparks Street, Ottawa, save and except supervisors, persons above the rank of supervisor, chef, desk clerks, security personnel, office and sales staff and students employed during the school vacation period.” (104 employees in the unit). (*Having regard to the agreement of the parties*).

0844-75-R: Office and Professional Employees International Union, Local #343 AFL-CIO-CLC (Applicant) v. Trenton Federal Credit Union Limited (Respondent).

Unit: “all employees of the respondent at Trenton, save and except the treasurer-manager.” (7 employees in the unit).

0845-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Normand & Fleming Limited (Respondent).

Unit: “all employees of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

0865-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Philco Ford of Canada Limited (Respondent) v. International Association of Machinists and Aerospace Workers L.L. 2113 (Intervener).

Unit: “all office, clerical, technical and professional employees of the respondent at its offices in the Municipality of Metropolitan Toronto, save and except supervisors; persons above the rank of supervisor, senior financial analyst; senior cost price investment analyst, private secretary to the Vice-President and General Manager, private secretary to the Controller, private secretary to the Industrial Relations Manager, private secretary to the Treasurer, private secretary to the Manager of Engineering, outside salesmen, plant nurse, persons employed on a project basis, persons regularly employed for not more than 24 hours per week, and persons covered by a subsisting collective agreement between the respondent and the International Association of Machinists and Aerospace Workers and its Local Lodge No. 2113.” (56 employees in the unit). (*Having regard to the agreement of the parties*).

0872-75-R: Operative Plasterers’ & Cement Masons International Association of the United States & Canada Local 124, Ottawa-Hull (Applicant) v. Urbanetic Limited (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0875-75-R: Christian Labour Association of Canada (Applicant) v. Trisen Tool and Die Limited (Respondent).

Unit: "all employees of the respondent at Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (14 employees in the unit).

0876-75-R: The Canadian Union of Public Employees (Applicant) v. United Counties of Stormont, Dundas and Glengarry (Respondent).

Unit: "all employees of the respondent in Glen-Stor-Dun Lodge in Cornwall who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, maintenance supervisor, housekeeping supervisor, kitchen supervisor, persons above the rank of supervisor, technical personnel, secretary to the Administrator and employees covered by subsisting agreements." (27 employees in the unit).

0878-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Jomco Ltee Constructeur de Routes (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell; save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0893-75-R: International Beverage Dispensers' and Bartenders' Union Local 280, of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Le Coq d'Or Restaurant Limited (Respondent).

Unit: "all full time and part time tapmen, bartenders, waiters, male and female, bar-boys and improvers in the employment of the respondent at the Le Coq d'Or Restaurant Limited, 333 Yonge Street, Toronto, Ontario, save and except manager, and those above the rank of manager." (21 employees in the unit). (*Having regard to the agreement of the parties*).

0907-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Goryn Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0913-75-R: United Brotherhood of Carpenters Joiners of America, Local 2466 (Applicant) v. E. S. Martin Construction (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0942-75-R: Laborers' International Union of North America, Local 749 (Applicant) v. P. L. S. Construction Ltd., General Contracting (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0598-75-R International Association of Machinists (Applicant) v. Venus Electric Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, technical staff and professional engineers." (404 employees in the unit). (Having regard to the agreement of the parties). (For the purpose of clarity, the Board noted that "technical staff" refers to industrial engineers, tooling engineer, mechanical engineering technician, draftsmen, assistant manufacturing engineer, incoming inspection technicians, laboratory technicians, and technologists.).

Number of names of persons on revised voters' list		399
Number of persons who cast ballots	356	
Number of spoiled ballots	6	
Number of ballots marked in favour of applicant	267	
Number of ballots marked against applicant	83	

0715-75-R: Canadian Union of Public Employees (Applicant) v. Ross Memorial Hospital (Respondent).

Unit: "all office and clerical employees of the respondent at Lindsay save and except secretaries to the Administrator, the Assistant Administrator-Patient Care, the Assistant Administrator-General Services, the Personnel Director; the office manager, persons above the rank of office manager, technical personnel, persons employed for not more than 24 hours per week, students in training and persons covered by subsisting collective agreements." (63 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	43	
Number of ballots marked in favour of applicant	26	
Number of ballots marked against applicant	17	

Applications Certified Subsequent to Post-Hearing Vote

0469-75-R: Canadian Union of Public Employees (Applicant) v. Board of Education for the Borough of North York (Respondent) v. Carpenters' Local Union 3219 (Intervener #1) v. Association of Professional Student Services Personnel (Intervener #2) v. Group of Employees (Objectors).

Unit: "all teachers aides in the employ of the respondent in its schools in the Borough of North York." (86 employees in the unit).

Number of names of persons on revised voters' list		66
Number of persons who cast ballots	64	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	52	
Number of ballots marked against applicant	11	

0485-75-R: Canadian Union of Public Employees (Applicant) v. Preston Springs Gardens Limited (Respondent).

Unit: "all employees of the respondent at Preston Springs Gardens at Cambridge, Ontario, save and except Professional and Medical Staff, Supervisors, persons above the rank of Supervisor, Technical Personnel, Office Staff, and students employed during the school vacation periods." (33 employees in the unit).

Number of names of persons on voters' list		30
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	9	

0728-75-R: United Steelworkers of America (Applicant) v. The Steel Company of Canada, Limited, Hilton Works (Respondent) v. The Patternmakers Association of Hamilton and Vicinity, an affiliate of the Patternmakers League of North America (Intervener).

Unit: "all journeymen, patternmakers and patternmaking apprentices employed by the respondent at its Hilton Works at Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons covered by a subsisting collective agreement between the respondent and the United Steelworkers of America at its Hilton Works." (9 employees in the unit).

Number of names of persons on voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	2	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0394-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 249 (Applicant) v. Peacock Drywall Limited (Respondent). (2 employees).

0516-75-R: Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124 Ottawa-Hull (Applicant) v. Carleton Formwork Limited (Respondent). (3 employees).

0590-75-R: Laborers' International Union of North America Local Union No. 597 (Applicant) v. Village Contractors (Respondent). (12 employees).

0676-75-R: International Federation of Professional & Technical Engineers, A.F.L., C.I.O., C.L.C. (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent) v. United Steelworkers of America (Intervener). (14 employees).

0740-75-R: Ontario Nurses' Association (Applicant) v. South Huron Hospital Association (Respondent). (10 employees).

0753-75-R: Retail Clerks International Association (Applicant) v. L. Leone Pharmacy Limited (Respondent). (7 employees).

0762-75-R: The Civil Service Association of Ontario Inc. (Applicant) v. Stratford General Hospital (Respondent) v. Group of Employees (Objectors). (43 employees).

0782-75-R: Toronto Printing Pressmen & Assistants' Union Local 10 Subordinate to International Printing and Graphic Communications Union (Applicant) v. Ronalds Federated Graphics (Respondent). (16 employees).

0784-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Cameron McIndoo Ltd. (Respondent). (6 employees).

0889-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bob Garner Construction Ltd. (Respondent). (4 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0696-75-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Hammond Manufacturing Company Limited (Respondent) v. Hammond Employees Association Committee (Intervener).

Voting Constituency: "All employees of the company at its facilities located in the city of Guelph and its distribution centre in the township of Puslinch save and except foremen, persons above the rank of foreman, office, clerical; sales and technical personnel, those engaged in design, research and laboratory work, students employed during the school vacation period, security guards, stationary engineers, persons engaged in a confidential capacity in matters relating to Labour Relations and persons regularly employed for not more than twenty-four hours per week." (457 employees).

Number of names of Persons on revised voters' list		437
Number of persons who cast ballots		414
Number of ballots marked in favour of applicant	153	
Number of ballots marked in favour of intervener	261	

0730-75-R: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Orton Driver Services Ltd. (Respondent).

Voting Constituency: "All employees of the respondent working in and out of Metropolitan Toronto, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, and persons regularly employed for not more than twenty-four hours per week." (60 employees).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots		46
Number of ballots marked in favour of applicant	20	
Number of ballots marked against applicant	26	

Certification Dismissed Subsequent to Post-Hearing Vote

2405-72-R: Hotel and Restaurant Employees Union, Local 743, Windsor, Ontario, affiliated with Hotel and Restaurant Employees and Bartenders International Union; AFL-CIO (Applicant) v. McDonald's Restaurants of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at McDonald's Restaurant located at 883 Huron Church Line, Windsor, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant manager and persons above the rank of assistant manager." (not stated employees in the unit).

Number of names of persons on revised voters' list		58
Number of Persons who cast ballots	51	
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	49	

0165-75-R: Canadian Union of Public Employees (Applicant) v. Sudbury and District Health Unit (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent who are regularly employed for not more than 24 hours per week or who are students hired for the school vacation period, save and except the Medical Director, the Secretary to the Medical Director; the Business Administrator, the Secretary to the Business Administrator, Dental Director; the Secretary to the Dental Director, Director of Nursing, Secretary to the Director of Nursing, the Assistant Director of Nursing, the Director of Public Health Inspectors, Secretary to the Director of Public Health Inspectors, Chief Public Health Inspector, Senior Public Health Inspectors, and employees covered by a subsisting collective agreement." (10 employees in the unit).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	3	

(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).

0645-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Applicant) v. Lakeview Builders Supplies Limited (Respondent).

Unit: "all office, sales and clerical employees of the respondent at North Bay, save and except persons above the rank of office manager, and students employed during the school vacation period." (9 employees in the unit).

Number of names of persons on voters list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant	3	
Number of ballots marked against applicant	5	

0698-75-R: International Union of Operating Engineers, Local 793-D (Applicant) v. Cox Construction Limited (Respondent).

Unit: "all employees of the respondent on the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in

the repairing and maintaining of same and all truck drivers and construction labourers, save and except non-working foremen and persons above the rank of non-working foreman.” (63 employees in the unit).

Number of names of persons on voters' list	48
Number of persons who cast ballots	44
Number of ballots segregated and not counted	3
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	30

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0798-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Reed Beaver Construction Forming Limited (Respondent). (3 employees).

0806-75-R: The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133; 1963, 3227 and 3233, U. B. C. & J. of A. (Applicant) v. Canadian Johns-Manville Co. Ltd. (Respondent) v. Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1316, 1617, 1940 and 2041 (Intervener). (35 employees).

0813-75-R: Canadian Union of Operating Engineers (Applicant) v. Listowel Memorial Hospital (Respondent) v. London and District Service Workers' Union, Local 220, S.E.I.U., A.F. of L., C.I.O., C.L.C. (Intervener). (8 employees).

0828-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Tamarron Corporation Limited (Respondent). (2 employees).

0849-75-R: Optical & Plastic Technicians & Allied Workers Union – Local 67 of the U.H.C. & M.W.I.U. - C.L.C. (Applicant) v. Imperial Optical Company Ltd. (Respondent). (6 employees).

0851-75-R: Marble Masons Tile Layers and Terrazzo Workers' Union No. 31 (Applicant) v. Transylvania Drywall (Respondent) v. International Brotherhood of Painters and Allied Trades, Local Union 1891 (Intervener). (3 employees).

0855-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. B.G. Chego Engineering Ltd. (Respondent) v. Local Union 1687 of the International Brotherhood of Electrical Workers (Intervener). (2 employees).

0857-75-R: RCA Victor Employees' Association (Applicant) v. RCA Limited (Respondent). (8 employees).

0858-75-R: Bakery and Confectionery Workers' International Union of America, Local 181 (Applicant) v. Levy's Bread (Respondent). (2 employees).

0870-75-R: Labourers International Union of North America, Local 837 (Applicant) v. A. R. Leslie Contracting Limited (Respondent). (2 employees).

0871-75-R: Laborers International Union of North America Local 749 (Applicant) v. P.L.S. Construction Ltd., General Contracting (Respondent). (3 employees).

0873-75-R: Operative Plasterers' & Cement Masons International Association of the United States & Canada Local 124, Ottawa – Hull (Applicant) v. John Kerr Construction Limited (Respondent). (2 employees).

0874-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Red Beaver Construction Forming Co. Ltd. (Respondent). (3 employees).

0877-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Cojom Ltee Constructeur de Routes (Respondent). (4 employees).

0882-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Goryn Construction Limited (Respondent). (not stated employees).

0899-75-R: Service Employees Union, Local 478, AFL-CIO-CLC (Applicant) v. Sensenbrenner Hospital (Respondent). (63 employees).

0900-75-R: Local Union 1190; United Brotherhood of Carpenters and Joiners of America (Applicant) v. Estwood Carpenters (Respondent). (4 employees).

0905-75-R: The Association of Allied Health Professionals: Ontario (Applicant) v. The Etobicoke General Hospital (Respondent) v. The Civil Service Association of Ontario (Inc.) (Intervener). (14 employees).

0906-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Carpentry (Respondent). (5 employees).

0908-75-R: Local Union 1190; United Brotherhood of Carpenters and Joiners of America (Applicant) v. Estwood Carpenters (Respondent). (4 employees).

0916-75-R: Hotels, Clubs, Restaurants and Taverns Employees' Union Local 261 (Applicant) v. Talk of the Town, City Hall Cafeteria (Hamway Brothers) (Respondent). (5 employees).

0941-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ryder Construction Limited (Respondent) v. Group of Employees (Objectors). 3 employees.

0980-75-R: Labourers International Union of North America, Local 837 (Applicant) v. Dickie Construction Co. Limited (Respondent). (3 employees).

Applications For Declaration Terminating Bargaining Rights Disposed Of

0552-75-R: Office Staff, Huntsville District Memorial Hospital (Applicant) v. Service Employees Union, Local 478 (Respondent) v. The Huntsville District Memorial Hospital (Intervener). (*Granted*).

Unit: "all full-time office and clerical employees of the Huntsville District Memorial Hospital, save and except the secretary to the administrator, supervisors, persons above the rank of supervisor, technical personnel, persons covered by subsisting collective agreements between Service Employees Union, Local 478 and the Huntsville District Memorial Hospital, the Nurses' Association – Huntsville District Memorial Hospital and Huntsville District Memorial Hospital, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (8 employees in the unit).

Number of names of persons on voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	9	

0600-75-R: Stanley L. Moffit (Applicant) v. Sheet Metal Workers' International Association, Local Union #540 (Respondent) v. Group of Employees (Objectors). (*Granted*).

Unit: "all employees of Roberts Gordon Appliance Corporation Limited at Grimsby, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (18 employees in the unit).

Number of names of persons on voters' list		27
Number of persons who cast ballots	22	
Number of ballots marked in favour of respondent	9	
Number of ballots marked against respondent	13	

0639-75-R: The Office Employees of Wood Alexander Limited At 225 King William Street, Hamilton, Ontario (Applicant) v. Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Wood Alexander Limited (Intervener). (*Granted*).

Unit: "all office and clerical employees of Wood Alexander Limited at Hamilton, save and except department managers and persons above the rank of department manager, chief accountant, one secretary to each of the following: Office Manager, Secretary Treasurer, Vice President and General Manager, and persons regularly employed for not more than 24 hours per week." (25 employees in the unit).

Number of names of persons on voters' list		23
Number of persons who cast ballots	21	
Number of ballots marked in favor of respondent	7	
Number of ballots marked against respondent	14	

0724-75-R: Bendix Automotive of Canada, Ltd. (Applicant) v. Amalgamated Plant Guard Local No. 1958 United Plant Guard Workers of America (Respondent). (no employees). (*Granted*).

0738-75-R: Thomas Bernard Wilson, (For the Employees) (Applicant) v. Graphic Arts International Union Local 28-B (Respondent) v. Gage Envelopes Limited (Intervener). (127 employees). (*Dismissed*).

0791-75-R: Huyck Environment Systems Limited (Applicant) v. Office and Professional Employees International Union, Local 81 (Respondent).

- and -

0808-75-R: Richard Ratz, Michael George, Milton Polowich, Brian Sitch, Patrick Huston; Richard Wilkes, Gwendolyn Zerabny and Evelyn Steyszyn (Applicants) v. The Office and Professional Employees International Union Local 81 (Respondent) v. Huyck Environment Systems Ltd. (Intervener). (11 employees). (*Dismissed*).

Applications For Declaration That Strike Unlawful Disposed Of

0218-75-U: Canadian Elevator Manufacturers, A Division of the Canadian Electrical Manufacturers Association (Applicant) v. Those persons named in Schedule "A" attached hereto (Respondents). (*Granted*).

0757-75-U: Ontario Hydro (Applicant) v. International Brotherhood of Electrical Workers, and its Local 1788, and those persons named in Schedule "A" hereto (Respondents) (*Withdrawn*).

0836-75-U: Modern Building Cleaning, A Division of Dustbane Enterprises Limited (Applicant) v. John M. Askin, on his own behalf and on behalf of London & District Building Service Employees Union, Local 220 (Respondents). (*Granted*).

0838-75-U: M. J. Finn Construction Ltd. (Applicant) v. Lake Ontario District Council of The United Brotherhood of Carpenters and Joiners of America, and Garland Wilson (Respondents). (*Withdrawn*).

0848-75-U: Holmes Insulations Limited (Applicant) v. Lucien F. Bonin, William Harvey Rumford, Charles Albert Smith et al, (See attached Schedule "A") (Respondents). (*Granted*).

0860-75-U: The Borden Company, Limited (Applicant) v. Ron Earl, et al (Respondents). (*Withdrawn*).

0867-75-U: The Borden Company, Limited (Applicant) v. Ron Earl, et al (Respondents). (*Withdrawn*).

0967-75-U: Valentine Developments (Applicant) v. Terry Fraser, Barry Fraser, and Local 105 of the International Brotherhood of Electrical Workers (Respondents). (*Direction*).

0976-75-U: Mechanical Contractors Association of Hamilton and Andco Anderson Limited (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 67, Trevor Byrne, Hugh Kerrigan, J. Aitken, D. Allan, D. Anderson, G. Arnott, V. Baiardo, C. Bainbridge, C. Barr, S. Battersby, L. Benzoni, F. Berdik, R. Blain, J. Boyd, W. Boyko, W. Brown, T. Bryk, M. Burke, G. Butteau, E. Campbell, M. Cehanczuk, P. Cehanczuk, C. Clarkson, F. Condello, S. Cormier, A. Cowser, J. Creary, J. Cummings, L. Cvetkovic, P. Daleo, F. Dancsecs, H. DeJaer, C. Dickson, G. Dixon, R. Dixon, F. Doxtator, K. Drover, R. Dudek, M. Dumais, H. Ellis, L. Ellis, G. Evans, J. Field, E. Fletcher, L. Foffano, D. Forbes, L. Forbes, G. Forgan, E. Fournier, T. Fournier, D. French, R. French, A. Gardiner, J. Garside, C. Gibson, L. Gilvear, P. Glasser, G. Graham, S. Greenhalgh, R. Greenridge, T. Hand, J. Haney, A. Harris, L. Hay, R. Hilbert, W. Hilbert, H. Hill, J. Holbourne, W. Hyde, J. Johnstone, W. Joravinski, M. Kari, W. Kunkel, J. Kurtz, V. Langdon, R. Lankester, G. Lawson, K. Leitner, L. Lemmon, C. Leversidge, F. Lucas, D. MacDonald, D. MacDougall, S. MacKenzie, P. Marshall, R. Marshall, H.

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Applications For Consent To Prosecute Disposed Of

0219-75-U: Canadian Elevator Manufacturers, A Division of The Canadian Electrical Manufacturers Association (Applicant) v. Barry McNeill, Reginald Kee, Douglas Gibbs, Robert Perro, Basil Saulnier, Ray Deane, Wayne Clough, William Rolfe, Richard Thomas and International Union of Elevator Constructors, Local Union 90 (Respondents). (*Dismissed*).

0250-75-U: The Lummus Company Canada Limited (Applicant) v. Rudy Sabourin, John Violette; Wayne Coutts, Roy Southwell, Larry Reeleeeder, Reg R. Pretty, Paul Violette, Reed Couture, Stan Slack, Earl Bjornson, Grant Jarvis, Howard Hetherington, Bill Babula, Erik Olsen, Harry Mortimer, James Trayler, Thomas Bradley, Marc Boulanger, Alden Morningstar, Glenn Smith, Thomas Vansickle, Lloyd McCabe, John Buckle, Ed Gammon, Dave Dixon, Bernard Hodgins, Klaus Bruckmann, Terry Phibbs, Walter Penter, Robert Plaine, John Houle, Ed Dekeluer, Robert Martin, Gerald Robillard, Ed G. Hyde, Al Pretty, Lloyd Young, Dwight Barber, Dan Coleman, Doug Dodge, Jerry Cushman, Basel Dew, Richard King, Brian Gould, Victor Villeneuve, Stephen Bradley, Patrick Colombo, Alec Brander, Jacques Lacasse, Robert Humphries, Garry Hodgins, and Mike Simmons (Respondents). (*Granted*).

0414-75-U: Canron Ltd. (Eastern Structural Division) (Applicant) v. Barry Lord, Gary Perly, Edward Taubert, Claude Browne and Ralph Ellis and Domenic Diamante (Respondents). (*Dismissed*).

0722-75-U: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees, Local Union No. 352, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Milnes Fuel Oil Ltd. (Respondent). (*Withdrawn*).

0796-75-U: Graham Food Products Limited trading as Hickeson-Langs Supply Company (Applicant) v. P. Moore et al (Respondents). (*Withdrawn*).

0797-75-U: The Ontario Food Division of the Oshawa Group Limited (Applicant) v. Marcel Amato et al (Respondents). (*Withdrawn*).

0826-75-U: Graduate Assistants' Association (Applicant) v. Board of Governors of York University (Respondent). (*Withdrawn*).

0827-75-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. MacDonald and Son (Timmins) Ltd. (Respondent). (*Dismissed*).

0839-75-U: M. J. Finn Construction Ltd. (Applicant) v. Lake Ontario District Council of the United Brotherhood of Carpenters and Joiners of America, and Garland Wilson (Respondents). (*Withdrawn*).

0861-75-U: The Borden Company, Limited (Applicant) v. Ron Earl, et al (Respondents). (*Withdrawn*).

Complaints Under Section 79 (Unfair Labour Practice) Disposed Of

0224-75-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Complainant) v. Teal Manufacturing Ltd. (Respondents). (*Terminated*).

0286-75-U: United Electrical, Radio and Machine Workers of America (Complainant) v. DeVilbiss (Canada) Limited (Respondent). (*Dismissed*).

0503-75-U: United Steelworkers of America, CLC (Complainant) v. Fielding Lumber Company Limited (Respondent). (*Granted*).

0652-75-U: Gina Ercegovic (Complainant) v. United Glass and Ceramic Workers of North America-Local 260 (Respondent). (*Dismissed*).

0685-75-U: International Woodworkers of America (Complainant) v. Terry Travel Trailers Ltd. (Respondent). (*Withdrawn*).

0723-75-U: Donat Chretien (Complainant) v. International Association of Bridge Structural and Ornamental Iron Workers – Local 786 (Respondent). (*Withdrawn*).

0767-75-U: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Western Dispatch Co. (Respondent). (*Withdrawn*).

0768-75-U: Mrs. Betty Y.Y. Navratil (Complainant) v. Cupe Local 79 (Respondent). (*Withdrawn*).

0769-75-U: Villacentres Limited, Owner and Operator of Bayview Villa Nursing Home (Complainant) v. Thomas Edwards; Canadian Union of Public Employees Local 1394 (C.U.P.E. 1394); Yvonne Champagne (Respondents). (*Withdrawn*).

0773-75-U: Albert Renaud (Complainant) v. Local 89, U.A.W. (Respondent). (*Withdrawn*).

0779-75-U: Albert F. Renaud (Complainant) v. Allied Chemical Canada Ltd. (Respondent). (*Withdrawn*).

0787-75-U: Mutual Employees' Association, Local 528, Service Employees International Union (Complainant) v. Flamboro Downs Holding Company Limited (Respondent). (*Withdrawn*).

0810-75-U: Gary Lyons (Complainant) v. Local 347, UAW & Alvin Fraser, Chief Committeeman (Respondents). (*Dismissed*).

0859-75-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Modern Building Cleaning, a division of Dustbane Enterprises Limited (Respondent). (*Withdrawn*).

0901-75-U: International Leather Goods, Plastic and Novelty Workers Union, Local 8 (Complainant) v. Celebrity Hand Bags Limited (Respondent). (*Withdrawn*).

0943-75-U: United Steelworkers of America (Complainant) v. Blue Giant Equipment of Canada Ltd. (Respondent). (*Withdrawn*).

Applications For Consent To Early Termination of Collective Agreement

0786-75-M: The Canadian Union of Base Metal Workers (C.N.T.U.) (Trade Union) v. Noranda Mines Limited (Geco Division) (Employer). (*Granted*).

0811-75-M: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union) v. National Sanitary Supply Company, Windsor, Ontario (Employer). (*Granted*).

0819-75-M: Canadian Paperworkers Union C.L.C. Local 545 (Trade Union) v. Reed Packaging Limited (Employer). (*Granted*).

Applications Under Section 55 Disposed Of

0687-75-R: Amalgamated Jewelry and Allied Trades Workers Union, Local 33, I.J.W.U. (Applicant) v. Marvel Jewellery Limited and Danbury Sales (1971) Ltd. (Respondent). (*Granted*).

0713-75-R: The Civil Service Association of Ontario (Inc.) (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Canadian Union of Public Employees, Local 43 (Intervener). (*Dismissed*).

0847-75-R: Civil Service Association of Ontario (Inc.) (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Kane Ambulance Service (R. S. Kane Ltd.) et al (Intervener # 1) v. Canadian Union of Public Employees and its Local 43 (Intervener #2). (*Dismissed*).

0887-75-R: CSAO Inc. (Applicant) v. Sun Parlour Ambulance Service (Respondent). (*Dismissed*).

Applications For Determination Under Section 95(2) Disposed Of

0689-75-M: Corporation of the City of Belleville (Applicant) v. Canadian Union of Public Employees and its Local 140 (Respondent). (*Granted*).

0733-75-M: The Canadian Union of Public Employees, Local Union No. 1600 (Applicant) v. Metropolitan Toronto Zoological Society (Respondent). (*Withdrawn*).

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0571-75-M: Stan-Kit Enterprises Limited (Employer) v. The Retail, Wholesale and Department Store Union, A.F.L., C.I.O., C.L.C. and its Local 448 (Trade Union).

0823-75-M: Art Vaillant Limited (Employer) v. Operative Plasterers and Cement Masons International Association, Local Union 344 (Trade Union).

0824-75-M: Best-Way Plastering (Employer) v. Operative Plasterers and Cement Masons International Association, Local Union 344 (Trade Union).

Applications For Reconsideration Of Board's Decision – Certification

0146-75-R: The International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Union Electric Supply Co. Limited (Respondent). (*Request Denied*).

0430-74-R: Labourers' International Union of North America, Local 183 (Applicant) v. High City Holdings (Respondent). (*Request Denied*).

0763-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Hoffman Concrete Products Limited (Respondent). (*Request Denied*).

STATISTICAL TABLES 2ND QUARTER AND 1ST 6 MONTHS OF FISCAL YEAR 1975-76

TABLE I

APPLICATIONS AND COMPLAINTS FILED WITH THE ONTARIO LABOUR RELATIONS BOARD

	Number Filed		
	2nd Quarter Fiscal Year 1975-76	1st 6 Months Fiscal Year	
		1975-76	1974-75
I. Certification	304	631	689
II. Declaration Terminating Bargaining Rights	19	34	21
III. Declaration of Successor Status	11	20	24
IV. Declaration that Strike Unlawful	22	65	56
V. Declaration that Lock-Out Unlawful	—	—	1
VI. Consent to Prosecute	46	88	76
VII. Complaint of Unfair Practice in Employment (Section 79)	68	135	83
VIII. Miscellaneous	36	72	171
TOTAL	<u>506</u>	<u>1045</u>	<u>1121</u>

TABLE II

HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD

	Number		
	2nd Quarter Fiscal Year 1975-76	1st 6 Months Fiscal Year	
		1975-76	1974-75
Hearings and Continuation of Hearings by the Board	304	659	641

TABLE III

APPLICATIONS AND COMPLAINTS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD BY MAJOR TYPES

	Number Disposed of		
	2nd Quarter	1st 6 Months Fiscal Year	
	Fiscal Year 1976-75	1976-75	1975-74
I. Certification	336	672	720
II. Declaration Terminating Bargaining Rights	17	34	29
III. Declaration of Successor Status	5	17	8
IV. Declaration that Strike Unlawful	20	45	43
V. Declaration that Lock-Out Unlawful	—	—	2
VI. Consent to Prosecute	30	52	68
VII. Complaint of Unfair Practice in Employment (Section 79)	49	125	108
VIII. Miscellaneous	29	62	147
	—	—	—
TOTAL	486	1007	1125
	==	==	==

TABLE IV

APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD
BY TYPE AND DISPOSITION

	Number of Applications			Number of Employees*		
	2nd Quarter	1st 6 Mths. F.Y.		2nd Quarter	1st 6 Mths. F.Y.	
	Fiscal Year	1975-64	1974-75	Fiscal Year	1975-76	1974-75
	1975-76			1975-76		
I. Certification						
Granted	215	442	496	4448	15949	16038
Dismissed	65	131	159	2760	6408	10330
Withdrawn	56	99	65	1076	1565	2006
TOTAL	336	672	720	8284	23922	28374
II. Termination of Bargaining Rights						
Granted	10	22	12	128	307	280
Dismissed	5	10	14	147	205	458
Withdrawn	2	2	3	339	339	1355
TOTAL	17	34	29	614	851	2093

*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time the applications for certification were filed with the Board. Totals for applications dismissed and withdrawn are approximate.

TABLE IV

APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD
BY TYPE AND DISPOSITION (CONTINUED)

		Number of Applications	
		2nd Quarter Fiscal Year 1975-76	1st 6 Months Fiscal Year
			1975-76 1974-75
III.	Declaration that Strike Unlawful		
	Granted	10	22 6
	Dismissed	3	6 13
	Withdrawn	7	17 24
	TOTAL	<u>20</u>	<u>45</u> <u>43</u>
IV.	Declaration that Lock-Out Unlawful		
	Granted	—	— —
	Dismissed	—	— 2
	Withdrawn	—	— —
	TOTAL	<u>—</u>	<u>—</u> <u>2</u>
V.	Consent to Prosecute		
	Granted	6	8 7
	Dismissed	7	9 12
	Withdrawn	17	35 49
	TOTAL	<u>30</u>	<u>52</u> <u>68</u>
VI.	Complaint of Unfair Practice in Employment (Section 79)		
	Granted	5	9 6
	Dismissed	13	35 51
	Withdrawn	31	81 51
	TOTAL	<u>49</u>	<u>125</u> <u>108</u>

TABLE V

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	2nd Quarter	1st 6 Months Fiscal Year	
	Fiscal Year 1975-76	1975-76	1974-75
Certification after Vote*			
Pre-hearing Vote	22	40	27
Post-hearing Vote	20	45	53
Ballots not Counted	—	—	2
Dismissed after Vote			
Pre-hearing Vote	14	21	47
Post-hearing Vote	18	33	25
Ballots not Counted	1	1	1
TOTAL	<u>75</u>	<u>140</u>	<u>153</u>

*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE VI

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	2nd Quarter	1st 6 Months Fiscal Year	
	Fiscal Year 1975-76	1975-76	1974-75
*Respondent Union Successful	—	2	3
Respondent Union Unsuccessful	8	17	10
TOTAL	<u>8</u>	<u>19</u>	<u>13</u>

*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent union is thus the respondent.



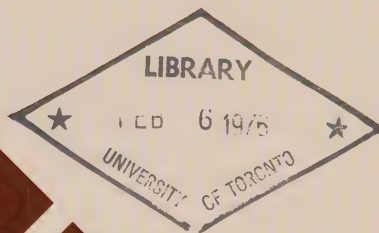
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0936-75-R Local 1590, International Brotherhood of Electrical Workers, (Applicant) v. **Bernardin of Canada Limited**, (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *A. M. Minsky and M. Fisher for the applicant; C. R. Osler, F. P. Wilkins and T. W. Shaw for the respondent.*

DECISION OF THE BOARD: October 14, 1975

3. Having regard to the agreement of the parties, the Board further finds that all employees of the company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. At the hearing in this matter the Board raised for representation by the parties the conclusion that should be drawn for purposes of section 7(1) of the Act as a result of the nature of the membership cards filed by the applicant in support of its claim for bargaining rights. The application is filed under the name of "Local 1590, International Brotherhood of Electrical Workers." The membership cards indicate that an applicant for membership is applying "for membership in International Brotherhood of Electrical Workers (AFL-CIO-CLC)." The spaces reserved for insertion of "a local no." were left blank on each of the 37 application for membership cards filed in support of the application. In thirty-two instances it was indicated by a separate document stapled to the application for membership card that the applicant paid a dollar in the way of initiation fees. These receipts show "Local 1590" on their face and are signed by a collector. The issue before the Board is whether the documentary evidence of membership submitted herein indicates that the signatories thereto have expressed a desire to be "members" of the applicant trade union for purposes of the count.

5. The Board has consistently ruled that evidence of membership in the international parent will not be used as evidence of membership in a local thereof. (See: *The Beaver Foundation Ltd.* case OLRB M.R. October [1967] 652; *McDonald's Consolidated Limited* case OLRB M.R. August [1969] 634). The Board has also stated that applicants for certification must be most circumspect in the quality of the evidence of representation filed in support of its claim for bargaining rights. (See: *The Journal Publishing Company of Ottawa, Limited* case OLRB M.R. July [1974] 499 at p501; *Le Droit Lee* case OLRB M.R. December [1970] 905). As a result of the apparent carelessness of the representatives of the applicant in conducting its campaign the Board is placed in the difficult position of discerning on the face of the documentary evidence the intent of the applicant for membership in signing a membership card. We do not know whether it was the applicant Local 1590 or its parent International that was intended to be signified as his "exclusive" bargaining agent. Therefore, as a result we are not satisfied that the applicant Local represents as "members" employees in the appropriate bargaining unit for purposes of section 7(1) of the Act. (See: *The J. D. Carrier Shoe Co. Ltd.* case OLRB April [1968] 54; *The Municipality of Metropolitan Toronto* case OLRB M.R. September [1967] 5737).

6. The Board furthermore is not prepared to permit oral evidence to be adduced in support of clarifying the intent of the applicant for membership in signing a card. We are of the opinion that it was not the intent of section 48(2) of *The Board's Rules On Practice And Procedure* to permit oral evidence "to identify and substantiate" the written evidence of membership with a view of perfecting inadequate evidence. If that were the case, the Board would be constantly waiving the privilege of the secrecy of membership evidence in order to permit trade unions to cure inadequate documentary evidence. (See; *The Cooper-Weeks Limited* case OLRB M.R. November [1969] 974). The requirements of the *Labour Relations Act* and the ancillary provisions of the *Board's Rules On Practice And Procedure* with respect to evidence of membership are designed to assure that appropriate measures have been taken by an applicant trade union for purposes of satisfying the Board that the documents submitted in support of an application for certification will support a finding for purposes of section 7(1). We do not agree that an indiscriminate application of section 48(2) of the Board's Rules for the purposes cited by the applicant will necessarily dissipate "the cloud" on the documentary evidence or facilitate the disposition of the applicant's claim for bargaining rights. (See; *Dinty's Kentucky Fried Chicken* case OLRB M.R. July [1970] 511). The most appropriate measure for avoiding future predicaments of this nature is for the Board to encourage applicant trade unions to exercise some care in instructing their representatives of the Board's requirements with respect to submitting acceptable documentary evidence of membership.

7. Accordingly the application is dismissed.

0513-75-R Laurie Gould, (Applicant) v. United Plant Guard Workers of America Amalgamated Local Union No. 1958, (Respondent) v. **Wackenhut of Canada Limited**, (Intervener).

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Laurie Gould for the applicant; David Baker, Ray C. Hildebrandt and Ernest Chadwick for the respondent; W. G. Phelps, Ray Anning and Duncan Stewart for the intervener.*

DECISION OF THE BOARD: October 14, 1975

1. This application for termination of bargaining rights was filed on June 26, 1965. In its decision of July 14, 1975, the Board directed that a representation vote be taken of the employees of Wackenhut of Canada Limited pursuant to section 49(3) of the *Labour Relations Act*. By letter dated August 11, 1975, the parties were advised that the vote would be held on Thursday, August 21, 1975. The Notice of Taking of Vote, Form 42, was sent to the parties as well as to each employee in the bargaining unit. The notice contained the following statement:

"I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Sunday, the 17th day of August, 1975, until the vote is taken."

This direction by the Registrar as contained in Form 42 was given pursuant to his authority under section 43(j) of the Board's Rules of Procedure.

2. The vote was conducted on August 21, 1975. Balloting was from 7:00 a.m. to 9:00 a.m.; 3:00 p.m. to 5:00 p.m., and 11:00 p.m. to 1:00 a.m., August 22. The Returning Officer's Report, a copy of which was sent to the applicant, respondent and intervener, discloses that there were 129 eligible voters of whom 74 cast ballots. Fifty ballots were marked in favour of the incumbent trade union and 24 ballots were marked against it. Subsequently, and prior to the expiration of the time for making representations as to the Returning Officer's Report; both the applicant and the intervener alleged that the respondent had violated the Registrar's no-propaganda direction. At the hearing to inquire into these allegations, the following relevant evidence was adduced.

3. On Wednesday, August 20, 1975, at approximately 7:00 a.m., A. W. Cler, Chairman of the respondent's Wackenhut unit, was approached by a reporter from the Windsor Star. At the time of the ensuing conversation, Mr. Cler was performing duties as a security guard at the Windsor Star. The reporter questioned him about the day and, upon the basis of the information obtained from Mr. Cler, the following news story appeared in the city edition of the Windsor Star:

PLANT GUARDS DECERTIFICATION VOTE SLATED

Officials of the Ontario Labor Relations Board (OLRB) will be in Windsor Thursday to conduct a decertification vote among members of the city's largest plant guard union.

The decertification bid involves 139 employees of Wackenhut of Canada Ltd. who are members of Local 1958, International Plant Guard Workers' Union.

A. W. Cler, head of the Wackenhut unit of Local 1958, said the decertification vote is the result of a petition carried out earlier this year by a disgruntled union member.

Mr. Cler said he is confident Wackenhut employees will vote to remain members of Local 1958.

He said the union's first contract with the firm, a two-year pact, expired July 1.

The union intends to begin bargaining for a one-year agreement when, and if, the decertification bid is lost.

Local 1958, he said, will seek a substantial hike over the present minimum wage of \$2.40 an hour.

“We’re the largest plant guard unit in the city and the poorest paid – It’s pretty tough with today’s cost of living,” said Mr. Cler.

An OLRB spokesman said the board held a hearing to make sure the decertification petition was legitimate.

He said the decertification bid will be successful if 50 per cent of the union members vote in favor of it.

The Windsor Star is the only Windsor daily paper and has a daily circulation of approximately 86,000.

4. The evidence also established that a Windsor radio station, CKWW, carried a similar story in its news broadcasts commencing at approximately 7:00 p.m. on Wednesday, August 20, through 9:00 a.m. Thursday, August 21. The texts of the radio news broadcasts varied slightly from time to time. The item was carried approximately nine times and most variations included reference to the prediction by the union that it expected that the decertification vote would fail. The evidence was that CKWW has the largest listener coverage of any Windsor radio station and reaches 80,000 households at its peak broadcasting time – 8:00 a.m.

5. Mr. Cler conceded that he was chairman of the Wackenhut committee; that he was elected to this position by the members of the bargaining unit; that he had participated in bargaining and in processing grievances; and, generally, that he was responsible for looking after the interests of all of the Wackenhut security guards on behalf of Local 1958. He has been a trade unionist since 1934. He was a staff representative of a major union some years ago and has been in the Guards’ Union for approximately three years. He was heavily engaged in the campaign leading up to the representation vote on August 21, 1975. He asserted that in giving an interview to the Windsor Star reporter he had not intended to engage in propaganda or electioneering. He stated that he was not trying to influence the vote and that his sole interest was to let the public know what was going on.

6. In determining whether the no-propaganda rule has been breached, we are concerned with the nature and contents of the impugned statements, as well as the question of their dissemination. As to the latter question, we have no doubt that the media coverage, although not specifically directed at members of the voting constituency, was sufficiently extensive so as to support the inference that the contents of the news stories came to the attention of at least some of the Wackenhut security guards. That was certainly the unstated inference in *Davis Leather Company Limited*, 47 CLLC ¶16,491. In so finding, we have taken into consideration the following statement of the Board in *International Nickel Company of Canada Limited* case, 62 CLLC ¶16,257: “The vice in the infringement of the Registrar’s direction lies in the presentation of propaganda or electioneering matter to eligible voters, not to members of the public at large.” However, in the *International Nickel* case, the potential newspaper distribution which could have been effected in the silent period was limited to 580 mailed subscriptions out of a total of 31,000 copies of the Sudbury Star. Here the story appeared in all copies of the city edition of the Sudbury Star as well as on the numerous radio broadcasts referred to. Where there is massive distribution in the area in which the voters reside, as in the instant case, the distinction drawn in *Inco* between distribution to eligible voters and distribution to the public at large cannot sensibly be maintained.

7. The remaining question is whether the contents of the newspaper article and the news broadcasts constitute "propaganda or electioneering" within the meaning of prohibition. Counsel for the applicant argued that since Mr. Cler had neither initiated the interview nor intended it to affect the outcome of the vote, it could not be regarded as propaganda or electioneering. If we were to agree with those submissions it would be a very simple matter for the prohibition to be circumvented in all cases. In our view, the determination cannot turn on the question of motivation, or on the subjective assertion of intention by the distributor. The proper test is whether it should reasonably have been anticipated by the person responsible for distribution that the material might affect the outcome of the vote.

8. Had the news item been limited to factual statements, we would have agreed that it does not constitute propaganda or electioneering. However, in the newspaper article Mr. Cler expresses his confidence that the employees will vote to remain members of Local 1958; that the union, if it is successful, will bargain for a substantial pay increase; and, finally, that Local 1958 is the largest plant guard unit in the city. While these can hardly be said to be widely partisan assertions, it is clear to us that they are all statements that would tend to invoke support for the respondent from persons in the voting constituency.

9. It is, of course, impossible to exhaust the various categories of propaganda. In the Board's jurisprudence, the examples range from relatively innocuous wearing of a button identifying the bearer as a supporter of the union (the *Kam Kotia* case, August 1962 (Board File 1492-61-R)) to the thorough-going partisan propaganda described in the *Automatic Electric (Canada) Limited* case, 62 CLLC ¶16,225. The purpose of the no-propaganda rule is to provide the voters with a seventy-two hour respite from *all* manner of persuasion. Thus, as the cases indicate, the degree of persuasion, the subjective intent of the ones engaging in it, and its effectiveness, are not controlling factors.

10. In the result, it is our opinion that a new vote be taken. In reaching this conclusion, we wish to make it clear that we have no reason to believe that Mr. Cler deliberately violated the Registrar's direction. There is nothing in evidence to suggest the interview with the Windsor Star reporter was pre-arranged or that it was a deliberate attempt on Mr. Cler's part to circumvent the ban on electioneering. It is equally clear that he had nothing whatever to do with the radio news broadcasts which, as the evidence disclosed, originated with the newspaper story.

11. We therefore direct that a new representation vote be taken among the employees of Wackenhut of Canada Limited. Those eligible to vote are all security guards employed at or working out of the premises of Wackenhut of Canada Limited at Windsor, in the County of Essex, save and except inspectors, persons above the rank of inspector and students employed during the school vacation period, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

12. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Wackenhut of Canada Limited.

13. The matter is referred to the Registrar.

7369-74-U Clifford Renaud et al, (Complainants) v. The United Steelworkers of America, Local 2471, and **Hawker Industries Limited, Canadian Bridge Division**, (Respondents).

DECISION OF BOARD CHAIRMAN T.E. ARMSTRONG, Q.C.: October 14, 1975

1. This complaint was filed on February 25, 1975. Pursuant to my obligation under section 91(4) of The Labour Relations Act, I assigned Messrs. F.V. Boscariol, J.D. Bell and O. Hodges to hear the complaint. On May 28, 1975 that panel convened a hearing in Windsor, Ontario, and on July 16, 1975, issued a decision on two preliminary matters raised by the respondents. The complaint is now scheduled for continuation of hearing in Windsor, Ontario on October 21 and 22, 1975.

2. By letter dated September 10, 1975 counsel for the complainants sent to the Board an application under section 91(11a) of The Labour Relations Act. Section 91(11a), enacted by Bill 111, 5th Session, 29th Legislature, Ontario, 24 Elizabeth II, 1975, section 24, reads as follows:

“Notwithstanding subsections 9, 10, and 11, and where in his opinion it is advisable to do so, the chairman, or in the case of his absence or inability to act the alternate chairman, may sit alone to hear and determine or may authorize a vice-chairman to sit alone to hear and determine any application, request, complaint, matter or thing in respect of section 60 or 60a or section 82, 83 or 123, and to exercise all of the jurisdiction and powers of the Board when so sitting.”

It should be noted that section 91(11a) came into effect the day Bill 111 received Royal Assent – Friday, July 18, 1975, almost two months after the first hearing in this matter.

3. The complainants now ask that I exercise my powers under section 91(11a) and authorize the chairman, alternate chairman or vice-chairman to sit alone and hear the instant complaint as well as a further complaint filed by the same complainants (Board File 0555-75-U). The complainant's request under section 91(11a) was sent to the respondents for their comments. By letters dated September 18, 1975 and September 29, 1975, respectively, counsel for the respondent United Steelworkers of America, Local 2471, opposed the request. Subsequently, I considered the written representations of all parties and on October 2, 1975 directed the Registrar to advise all parties of the complainants' request under section 9(11a) was denied. A letter to that effect was sent by the Registrar to counsel for all parties on October 2, 1975.

4. By letter dated October 7, 1975 counsel for the complainants requested that he be provided “with the reasons for the denial of our request that an order be granted pursuant to section 91(11a) of The Labour Relations Act”. Counsel does not stipulate the basis for his request for reasons. It may be that the request is based upon section 17 of the *Statutory Powers Procedure Act, 1971*. If so, it is far from clear that an assignment by the chairman or alternate chairman under 91(11a) – essentially an administrative act – can be said to be a “final decision and order” within the meaning of section 17 of the *Statutory Powers Procedure Act*. However, in the circumstances I am prepared to set out the reasons why the complainants' request for a single hearing officer has been denied.

5. It is in the interests of all parties that this matter proceed expeditiously and that unnecessary duplication and repetition of evidence and argument be avoided. These objectives can best be achieved, in my view, by permitting the panel seized with the matter to complete it. There are no grounds whatever for believing that the panel is incapable of rendering a fair and impartial decision.

6. Moreover, it is evident from a reading of the Board's interim decision dated July 17, 1975 that considerable evidence and argument has already been received on matters which, although preliminary in nature, relate to the substance of the complaint. In particular, as the decision records, the panel was required to hear considerable evidence in relation to the argument of the respondent The United Steelworkers of America, Local 2471 that the complaint should be dismissed because of the complainants' alleged undue delay in instituting the proceedings. If the matters were now to be assigned to a single hearing officer, the proceedings would have to commence *de novo*. This would mean that the preliminary motions, if renewed, would have to be relitigated and decided afresh. That kind of duplication in time and expense is clearly undesirable.

7. For the above reasons I directed the Registrar, on October 2, 1975, to advise counsel for the complainants that his request under section 91(11a) had been denied.

0707-75-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. **Catalano Produce Ltd.,** (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *I. J. Thomson for the applicant; W. J. McNaughton for the respondent.*

DECISION OF THE BOARD: October 8, 1975.

1. This is an application for reconsideration filed by the respondent challenging the constitutional integrity of the Board's decision dated September 3, 1975 certifying the applicant trade union for a group of the respondent's employees.

2. Counsel argues that because the respondent's warehouse operations are totally dependent upon its source of supply of fruits and vegetables in Detroit, Michigan, the undertaking is an international enterprise whose employer-employee relations ought to be governed by *The Canada Labour Code*. The crux of the issue is whether the respondent's practice of dispatching its own trucks across the border into Detroit to obtain its supply of produce renders the entire wholesale enterprise extra-provincial.

3. The parties submitted the following agreed statement of facts in support of their respective positions:

“AGREED STATEMENT OF FACTS

1. The Respondent's business is the purchase of fresh fruit and produce for wholesale sale and distribution.

2. On each business day a truck driven by a member of the bargaining unit travels from the Respondent's warehouse in Windsor, Ontario, Canada, to Detroit, Michigan, U.S.A., where it is loaded with 20,000 to 24,000 lbs. of mixed fresh fruit and vegetables, purchased by the Respondent for use in its business. Truck and cargo then return to the Respondent's warehouse in Windsor, from which the produce is sold and distributed.

3. On Mondays, two truck loads are frequently brought in. The same driver is not necessarily used each day.

4. The produce so carried represents about one-third of the Respondent's daily volume of business. The remaining two-thirds is made up of fruit and vegetables imported by the Respondent or other wholesalers in carloads directly from Florida or California to the Respondent's warehouse in Windsor. In season, fresh Ontario grown vegetables such as carrots etc., comprising less than ten per cent of the business volume at that time, may come from Toronto.

5. The above manner of operation and proportions are identical to those which prevailed in June and July, 1970. The method of operation has remained unchanged since that date.

6. The Respondent holds no P.C.V. licences.

4. The Board, having regard to the representations of the parties with respect to the nature of the respondent's operations as described in paragraph 3 herein, is satisfied that the respondent operates "in pith and substance" a local work and undertaking within the meaning of section 92(10) of *The British North America Act* (1867) and whose employer-employee relations are properly regulated by Provincial Statute. (See: *F.B.I. Foods* OLRB M.R. June [1975] 522; *Mason Windows Limited* case OLRB October [1973] p547; *Wm. R. Barnes Company Ltd.* case OLRB M.R. September [1967] p566; *Crane Carrier Canada Ltd.* case OLRB M.R. September [1970] p665; *Domtar Limited, Trucking Division* case OLRB M.R. July [1970] p495; *Compagnie Miron Ltee* case OLRB M.R. December [1972] p1034; OLRB M.R. January [1973] p60.)

5. Accordingly the respondent's application for reconsideration is dismissed.

0597-75-U Barrie Typographical Union, No. 873, (Complainant) v. **The Barrie Examiner**, (Respondent).

BEFORE: D.D. Carter, Vice-Chairman and Board Members F.W. Murray and H. Simon.

APPEARANCES: *J.R. Wrigley for the complainant; C.A. Morley and J.A. Robb for the respondent.*

DECISION OF VICE-CHAIRMAN D.D. CARTER AND BOARD MEMBER H. SIMON: October 6, 1975

1. This is a complaint under section 79 of the *Labour Relations Act* alleging that David Scott was dealt with by the respondent contrary to the provisions of sections 58(a) and 70(2) of the Act. At the hearing, the Board ruled that the complaint relating to section 70(2) was to be struck out, because of the complainant's failure to supply sufficient particulars in advance of the hearing, as required by section 47 of the Board's Rules of Procedure. It was made clear, however, that this ruling did not prevent the complainant from dealing with changes in working conditions at or around the time of certification insofar as this evidence tended to show a pattern of conduct that related to the discharge of Scott.

2. The incident giving rise to the complaint relating to section 58(a) was the dismissal of Scott, which occurred on July 7, 1975. The reason given for the discharge was Scott's use of profane and abusive language, directed at both the publisher, James Robb, and the respondent company. The events surrounding this incident require some elaboration. Scott's camera, valued at over \$1,100.00, was stolen from a company car on July 6, the day prior to the discharge. On the morning of the 7th, this loss was reported to Robb, who suggested that Scott see the respondent's business manager about the matter. Upon talking with the business manager, Scott learned that the company's automobile insurance policy did not cover loss of contents. Apparently upset by this disclosure, Scott made some disparaging remarks about the company to the business manager and then returned to his desk. Shortly after returning to his desk, Scott paid a visit to Robb's office for the purpose of expressing his agitation over the lack of insurance coverage.

3. The two accounts of what transpired differed. According to Robb, upon being informed that the general practice was for companies not to carry such insurance, Scott replied in profane and abusive terms, calling him a "fucking bastard". In response, Robb stated, "you have just said the magic words as far as I'm concerned David". Robb testified that he used this phrase to indicate that he couldn't tolerate being spoken to in such a manner. Robb then told Scott to be calm and informed him that he could make a claim under his householder's policy. Scott indicated that he had let his policy lapse and then remarked that the "cheap, fucking company probably doesn't carry collision insurance on its cars". Scott then assumed that he was fired and asked for his pay, to which Robb replied, "I didn't say you were fired David". Robb testified that he did not decide to fire Scott until later that day, after having consulted the respondent's labour relations advisor.

4. Scott's account of the incident was somewhat different. He testified that Robb appeared to react with indifference upon being informed that the respondent's insurance did not cover the loss. This attitude of indifference prompted Scott to enquire as to whether Robb cared about the loss, to which he replied, "what is there to care about?" Scott then re-

torted that he had been working since 5:30 a.m., indicating the difference between himself and management – his concern and their indifference. Robb then asked about his householder's policy and was informed that it had lapsed. Scott, because of Robb's indifference, then became critical of the respondent's operation, ending with the rhetorical question, "what sort of fucking company is this?" Robb then replied, "you've just said the magic word". Scott then asked whether he was fired and Robb answered in the negative. Scott testified that, after lunch, he was informed by David Henshaw, the managing editor, that his employment had been terminated.

5. Our assessment of the situation, after considering the two accounts, is that Scott did direct profane and abusive language at the publisher. The purpose of Scott's visit to Robb was to express his agitation over the lack of insurance to cover the loss of the camera. Scott testified that he became further upset when confronted with Robb's attitude. Given Scott's state of mind, it seems probable that he became abusive during the meeting with Robb, and probably crossed over the line between acceptable and unacceptable communications with a work superior.

6. Profanity and abuse toward a work superior, in the absence of other factors, is certainly a justifiable reason for discharging an employee. In this case, however, there are other factors that give the situation a somewhat different colour. In late May of this year, the complainant union began to organize the employee in the newsroom, an application for certification being made to the Board on May 28. The evidence indicates that the publisher and managing editor then began to question several of the newsroom employees about whether they had joined the union, while at the same time indicating to them that union membership was likely to affect adversely their careers in journalism.

7. David Scott appeared to be the primary target for this approach, being questioned in this manner on no less than three occasions. On the first occasion, occurring four days after the posting of the notice of application, Robb asked Scott for his opinion on the union, and then indicated that his career would be harmed by affiliation with a union. Subsequently, in a second conversation, Robb informed Scott that an expected pay raise would not be awarded, and then asked whether he had signed with the union. Upon being told by Scott that he had joined the union, Robb then asked whether it would make any difference if Frank Stone (the city editor) was fired. The final occasion, occurring close to the date of the certification hearing, assumed a more clandestine air. Instead of meeting at the office, Robb and Scott met at the nearby bus station, where Robb asked Scott to make efforts to dissuade the other employees from pursuing the certification. Later that day, Scott reported to Robb that employee attitudes had not changed, at which point Robb indicated to Scott that he was on a "sinking ship". The frequent exchanges between Robb and Scott at this time suggest that Robb believed that Scott might have some influence with the other employees, and that he might be used to persuade the employees to abandon the union. It is obvious, however, that this did not happen, as the union was certified on June 17.

8. The respondent's attitude to the certification application manifested itself in other ways. The evidence indicates that, upon learning of the application, the respondent took a harder line in dealing with its employees. Pay raises, apparently promised to both Scott and a fellow employee, Rolf Kraiker, were held back. Scott and another employee, Sheila McGovern, were also told that their saved days (accumulated days-off resulting from the operation of the newspaper on Saturdays) could not be used as part of their vacation, a di-

rection which appeared to deviate from the previous practice. In the case of Sheila McGovern, the respondent relented after representations were made by the union representative, James Duffy. Scott did not object and took the days-off as directed. There is some evidence that this tougher attitude continued after the certification. On July 22, Pat Kehoe received a formal written warning that any further incident of misbehaviour on his part would result in immediate dismissal. Sometime in the first week of August, Jim Dalzeil received a similar type of letter. Frank Stone, the city editor, who had been employed by the respondent for four years, testified that he was not aware of this form of discipline being used on any previous occasion.

9. The location of the onus of proof is an important consideration in cases such as this one. The reasons, or reason, behind the discharge of an employee occurring in the context of union activity are best determined by an examination of the objective circumstances surrounding the discharge. In other words, the circumstantial evidence surrounding the discharge must be examined and inferences drawn from that evidence. There are two competing inferences that can be drawn – either that the discharge was motivated by an anti-union animus or that the discharge was for some reason totally unrelated to the presence of union activity at or around the time of discharge. The Board must determine which of the two inferences is the more probable. In many cases, however, often because of the unsatisfactory nature of the evidence, it may be difficult to draw either inference with much certainty. In such cases, where the evidence is equally balanced, a decision can only be rendered by resorting to the onus of proof. Since neither party can establish a case on the balance of probabilities, the case can only be determined by deciding against the party upon whom the burden of proof rests.

10. As the result of one of the recent amendments to the *Labour Relations Act*, employers now bear the burden of establishing that they did not act contrary to the Act where it is alleged that a person has been “refused employment, discharged, discriminated against, threatened, coerced, intimidated, or otherwise dealt contrary to this Act as to his employment”. The effect of this amendment is that the burden of proof in cases such as this one has been reversed, moving from the complainant to the employer. The amendment reversing the onus, however, did not become law until July 18, 1975, the date when the amending Act received Royal Assent, raising the question of whether the reverse onus applies in the disposition of this case. The complaint in this matter was filed on July 11, and many of the facts of this case arose prior to when the amendment came into force. The hearing of this matter, however, took place on August 13, well after the amendment had become law.

11. The application of new legislation is a frequent problem and it is not surprising, therefore, to find clearly elaborated rules of interpretation dealing with the time at which legislation has first effect. The general rule, as set out in *Maxwell on Interpretation of Statutes* (11th ed.) at p. 205, is that “no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication”. This rule recognizes the fact that persons rely upon existing legislation, their actions being influenced by the current state of the law and not by future possibilities. To construe legislation retrospectively would have the effect of defeating legitimate expectations as to the existence of legal rights and obligations.

12. Where the legislation relates to matters of procedure, however, a different interpretative approach is taken, the Courts not insisting that the legislation be given a totally

prospective effect. The explanation for this departure from the general rule may be found in the words of Wilmer, L.J., in *Blyth v Blyth and Pugh*, [1965] 2 All. E.R. 817 (C.A.) at p. 823:

...[I]t becomes clear that what s. 1 of the Matrimonial Causes Act 1963 is dealing with is a purely procedural matter, viz., the admissibility of evidence to rebut what had hitherto been held to be conclusive evidence against the husband. The effect of this section is to abolish the procedural anomaly whereby a distinction was drawn between husband and wife with regard to the evidence which they were permitted to give. This being so, I think that this section is to be construed as governing the procedure to be followed in all cases brought to trial after the Act of 1963 came into force, irrespective of the date of the events to which the evidence may be directed. To say that this involves the section, being given retrospective effect is, I think, perhaps misleading. The true view is rather that the section looks forward to the conduct of trials that take place after the coming into force of the Act...

13. These remarks suggest a conclusion that, although a rule of procedure may relate to matters that occurred prior to its enactment, this does not mean that there is a retrospective application of the rule. The reason for this conclusion can be found by examining the nature of procedural rules. Rules of procedure, generally speaking, do not define standards of conduct, nor do they create substantive rights and obligations. Rather, procedural rules provide a legal structure in which standards of conduct can be applied and rights and obligations can be determined. Procedure is merely the means by which the law is administered. Changes of procedure, therefore, do not have a retrospective effect where they merely change the means by which the law is administered subsequent to their enactment, even though these rules may deal indirectly with conduct occurring prior to this time. As has been said in many cases, "no person has a vested right in any course of procedure".

14. Rules relating to the location of the onus of proof are unquestionably rules of procedure. The onus of proof only comes into play after the trier-of-fact has found the evidence to be so evenly balanced that no clear conclusion can be drawn. See *Robins v National Trust Co. Ltd.*, [1927] 2 D.L.R. 98 (J.C.P.C.). In this situation, the trier-of-fact must then fall back upon the rule relating to the location of the onus of proof, and make an evidential finding against the party upon whom the burden rests. Rules as to onus, therefore, are rules of evidence, establishing a procedure to be followed where the evidence of two opposing parties is evenly balanced. Support for this conclusion can be found in *R v Krumps*, [1931] 3 D.L.R. 767 (Man. C.A.); *dicta* to the same effect can be found in *Attorney General v Halliday*, [1866-67] U.C.Q.B. 397 and *Sanders v Malsbury*, (1882), 1 O.R. 178. In view of this authority, there is no doubt in our minds that the amendment to section 79 of the *Labour Relations Act*, reversing the onus of proof, is a rule of procedure.

15. The reverse onus, because it is a matter of procedure, can be construed as applying to all hearings held subsequent to its enactment. This construction does not give retroactive effect to the rule. Since the rule is one directed to the assessment of evidence at the hearing, the critical point of time is the hearing, and not when the events which are the subject of the evidence occurred. So long as the hearing is held after the rule comes into force, the rule cannot be said to operate retroactively. At this point, a distinction should be made between the commencement of proceedings and the holding of the hearing. Because the rev-

erse onus does not come into play until after the evidence has been heard at the hearing, the mere fact that the proceedings in this case were commenced prior to when the amendment came into force does not add an element of retrospectivity. As was pointed out in *Wicks v Armstrong* (1928), 61 O.L.R. 667, at p. 669, amendments to rules of evidence apply immediately, regardless of when proceedings are commenced.

16. There appear to be good reasons for allowing evidential rules to come into effect immediately. The facts material to a case may span a considerable period of time, and, as in this case, some may occur before enactment of the rule and some may occur subsequently. If the law were to provide that every single fact must occur after the enactment in order for the rule to apply, then full implementation of the enactment might be delayed indefinitely, as a party would only have to establish one fact arising prior to the enactment in order to avoid the application of the amendment. Such an approach would lend uncertainty to the application of the rule of evidence by the Board, depriving both parties of the advantage of knowing the location of the onus at the commencement of the hearing, since this matter could only be determined once the Board had established when all facts had occurred and whether these facts were material. Immediate application of this evidential rule avoids all of the disadvantages associated with uncertainty, and does not appear to impose any unusual hardship on the party against whom the rule works. The rule determining the location of the onus is not a rule of conduct and should not influence the actions of that party occurring prior to its enactment. At most, the rule affects conduct at the hearing, the party bearing the onus usually proceeding first. In this case, the parties were informed of the Board's position that the amendment reversing the onus of proof applied to the case and, because of this ruling, the respondent chose to proceed first. In this case, therefore, there is no compelling reason to depart from the usual practice of giving immediate effect to procedural amendments.

17. What then is the extent of the burden of proof that has been shifted by statute to the respondent? The Act speaks of the burden of proof "that any employer ... did not act contrary to this Act". In its earlier decisions, this Board has stated that, even if only one of the reasons for a discharge related to union activity, the discharge would nevertheless constitute a violation of the Act. For a review of this jurisprudence, see *Delhi Metal Products Ltd.* [1974] O.L.R.B. 450. In other words, the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct. This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

18. The respondent in this case contends that the only reason for the dismissal was Scott's abusive and profane conduct at the meeting with Robb on July 7, a reason totally unrelated to the existence of union activity at the newspaper. Weighing against this contention are a number of considerations that suggest a quite different conclusion. These considerations are: 1) a pattern of anti-union conduct occurring about the time of dismissal; 2) the substantial extent to which this pattern of conduct was directed at Scott; 3) Scott's above-average performance as an employee; 4) Robb's lack of candour about the extent of his own participation in the pattern of anti-union conduct.

19. The evidence, in our opinion, establishes a clear pattern of anti-union conduct on the part of the respondent occurring prior to certification of the complainant. The interviewing of employees about their union affiliation, and the remarks about the effect of this affiliation upon their careers, must be construed as nothing less than threats to dissuade these employees from pursuing their rights under the *Labour Relations Act*. The change of policy in respect to the accumulation of saved days for vacation purposes, just prior to the certification hearing must also be construed as anti-union conduct. There is no doubt that, prior to the certification, the respondent was resorting to means expressly prohibited by the Act in order to influence the employees against the union. The apparently unprecedented use of formal warnings in the cases of Kehoe and Dalzeil indicate that, even after the certification the respondent was adopting a much tougher attitude in its employee relations, suggesting a continuation of this pattern of anti-union conduct. Given these circumstances, it is quite possible to infer that the dismissal of Scott was simply one piece in a continuing pattern of conduct designed to undermine the position of the union, both before and after its certification.

20. A second consideration is the special attention paid to Scott by Robb once the presence of the union became known. Scott appeared to be singled out, suggesting that Robb was attempting to use Scott to influence the other employees against the union. Upon the failure of this tactic, it is quite possible that Robb's attitude to Scott was something less than benign, and this attitude may have influenced Robb in his decision to dismiss Scott.

21. Scott, moreover, appeared to be an above average employee. The preponderance of the evidence indicated that he was an exceptional photographer, and a competent journalist. Apparently, the only blot on an otherwise good work record was the incident that led to the dismissal. The presence of an otherwise excellent work record suggests that these were good reasons for giving Scott a second chance by overlooking the one outburst. Scott was a valuable employee and his dismissal would be to the respondent's detriment. As well, it is reasonable to assume that Scott's indiscretion was not likely to pose a serious discipline problem to the newspaper, which appeared to tolerate more free-wheeling discussions between employees and management than would the industrial employer. Scott's use of profane and abusive language, moreover, did not immediately trigger the decision to dismiss. The decision was made sometime after the confrontation, allowing Robb to assess the matter in a more detached manner, and also possibly providing an opportunity for anti-union considerations to influence the decision.

22. The final consideration is Robb's lack of candour when being cross-examined as to the extent of his participation in anti-union activities. Probably one of the most effective ways in which an employer can satisfy the new onus under section 79 is for it to tell its story, through its witnesses, in a frank and honest manner. Conversely, a lack of candour, even in respect of only one part of the testimony, is likely to raise doubts as to the genuineness of the reasons provided by the respondent. This case is not an exception to the latter proposition.

23. This is the type of case where the evidence does not point to a clear conclusion. Our assessment of the evidence is that witnesses on both sides were less than frank. We have already pointed out the defect in Robb's testimony, and we should also indicate that we are not completely satisfied with the part of Scott's testimony relating to his confrontation with Robb. Partly because of the unsatisfactory nature of some of the testimony, the evidence in

this case is evenly balanced. The burden of proof, however, requires the respondent to establish a case on the balance of probabilities. In other words, it must establish that the more probable of the two inferences to be drawn from the evidence supports its contention that the dismissal was for a reason unrelated to the presence of the union at the newspaper. In this case, this burden has not been satisfied, since an equally probable inference of anti-union conduct can be drawn from the same evidence. The respondent, therefore, has not established on the balance of the probabilities that it did not act contrary to the Act in dismissing David Scott.

24. Accordingly, the Board directs that the respondent forthwith reinstate David Scott in the same position which he held on the date of his termination, and that the respondent pay to David Scott full compensation for any lost wages to which he is entitled to the date of reinstatement. The Board remains seized of the matter to deal with any disagreement between the parties arising out of the implementation of these directions.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. While I would agree with the conclusions reached in the decision concerning the application of the recent amendments of the Act with respect to the reverse onus, I would find that the Respondent has properly discharged this onus under the Act.

3. I have reached this decision having carefully considered all of the evidence and I have concluded that Mr. Robb delayed discharging David Scott only because he was required to consult with the Respondent's labour relations advisor.

4. The evidence in my opinion shows that Robb immediately reacted as most persons would be to the abusive terms Scott used in the encounter concerning insurance coverage and was only restrained from taking immediate action by his knowledge that all such matters were to be referred to the Respondent's counsel. The evidence is clear that Robb had been instructed not to make any decisions relating to labour relations without prior consultation.

5. While both the testimony of Robb and Scott fell quite short of being completely satisfactory, I would not conclude that the evidence is evenly balanced, and I find that the reason Robb discharged Scott was for the profane and abusive language Scott directed to Robb.

6. Accordingly, I would have concluded that the Respondent has met the burden of proof and I would have dismissed the application.

5044-73-U Canadian Textile & Chemical Union, (Complainant) v. Dorothea Knitting Mills Limited, (Respondent).

BEFORE: Frank V. Boscariol, Vice-Chairman, and Board Members F. W. Murray and P. J. O'Keefe.

APPEARANCES: *Ms. M. Parent, Ms. R. Reynolds and Ms. L. Ritchie for the complainant; E. L. Stringer, Q.C. and B. Borsook for the respondent.*

DECISION OF FRANK V. BOSCARIOL, VICE-CHAIRMAN, AND BOARD MEMBER P. J. O'KEEFE. October 3, 1975

1. For the reasons as set out in the majority decision of the Board dated July 15, 1975, the Board directed the parties to meet forthwith with a view of agreeing to the amount of loss of earnings, if any, sustained by Miss Randi Reynolds since June 27, 1974. The parties however could not reach an agreement in this regard and accordingly the matter was set down for hearing on September 18, 1975.

2. The evidence as adduced at the hearing establishes that Miss Reynolds obtained employment at the Toronto General Hospital commencing August 21, 1974, and worked there until June 6, 1975 a period of some 41 weeks. From July 7, 1975 until August 8, 1975, she was gainfully employed for 4 weeks on an OFY project. Her earnings during the course of these periods (e.g. some 45 weeks) amounted to approximately \$5,600. For the purposes of making its representations in this matter, Counsel for the respondent assumed that at best (and leaving aside considerations with respect to short work weeks and other possible lay-offs) Miss Reynolds would have earned approximately \$5,500.00 had the respondent not unlawfully terminated her services. Accordingly, it is the respondent's submission that in the light of the fact that Miss Reynolds earned more elsewhere than what she would have been paid had she been retained by the respondent, then, in the circumstances, no compensation ought to be forthcoming to her from the respondent. Should the Board find that compensation is owing, Counsel for the respondent reserved the right to adduce evidence with respect to the alleged short work weeks and other lay-offs affecting Miss Reynolds' earnings at the relevant times.

3. The applicant on the other hand maintains that Miss Reynolds should nevertheless be compensated by the company for alleged loss of earnings of approximately \$1,100 occasioned during the two specific periods she remained unemployed, namely from June 27, 1974 until August 20, 1974 and from June 9, 1975 to July 4, 1975. These periods in total encompass approximately 12 weeks.

4. In this regard, the representative for the applicant sought to adduce evidence from Miss Reynolds in order to establish that her higher earnings at the hospital were due to her "greater input of work" at that establishment as compared to the demands of her former job with the respondent. Further, the Board was asked to entertain evidence with respect to the terms of Miss Reynolds employment at the hospital in order to determine whether she was "justified" in quitting her job there on June 6, 1975. Accordingly, the applicant submitted that should Miss Reynolds not be compensated for the 12 weeks in question, she would in effect be penalized because of her successful attempts to mitigate her loss. In contrast, Counsel for the respondent suggested that the Board need not speculate in this

area and even if there had been an “extra effort” exerted by Miss Reynolds with respect to her job at the hospital, it was nevertheless expended over a shorter period of time, and that in fact she had the benefit of a work-free period of 12 weeks. The Board, declined to entertain any evidence with respect to such matters in the particular circumstances as it would have, in our opinion, raised speculative issues which are too remote to the question of compensation presently before us.

5. There is no suggestion in these proceedings that Miss Reynolds has failed to exert all reasonable efforts to mitigate her losses. The immediate question to be now resolved by the Board may be summarized as follows: When an employee who has been discharged contrary to the provisions of *The Labour Relations Act* is successful in obtaining alternative employment at a higher rate of pay, should he nevertheless be entitled to compensation for losses incurred during any intermittent periods of unemployment prior to his reinstatement with the offending employer?

6. In the *Brayshaw Steel Limited* case OLRB M.R. June 1970, p.271 at page 281, the Board stated:

“The purpose of section 65 (now section 79) is to make whole a person who has been discharged contrary to the Act, and in finding for reinstatement, the Board puts the employee in the same position as if he was not discharged.”

It would appear that the common law principle in this regard was initially adopted by the Board in the *Cronin's Limited* case OLRB M.R. January 1965, p.533 where the Board was confronted with the issue as to whether the difference between the discharged employees' hourly rate and the intervening statutory minimum hourly rate should be taken into account in the assessment of damages incurred during the relevant period. At page 536, the Board stated as follows:

“In consequence, it is our view that if the matter had arisen in an action for damages for wrongful dismissal rather than as here for discriminatory discharge under The Labour Relations Act, the increase brought about by the minimum wage order, in such circumstances as exists in the present case, would be treated as a proper element in the computation of damages at common law (see e.g. *Mayne and McGregor on Damages* 12 ed. at p.522 and *Beckham v. Drake* (1849) 2 H.L.C. 579, pp.607-608). In any event, we believe that it is a proper element in the assessment of compensation as that is envisaged under section 65 (now section 79) of The Labour Relations Act.”

7. The general position as summarized in the said text of *Mayne & McGregor* (supra) at page 522 is as follows:

“The measure of damages for wrongful dismissal is prima facie the amount that the plaintiff would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the plaintiff, in minimizing damages, either had obtained or should reasonably have obtained.”

As regards the amount of monies actually obtained by the employee during the course of such alternate employment, or in the alternative, the amount of monies that the employee should have obtained had he made reasonable efforts, the authors cite further common law jurisprudence to establish two additional principles. The first of these principles appears at page 525, and is to the effect that:

“Any amount that the plaintiff has earned in substituted employment since the breach will be deducted and the loss incurred will vanish where the plaintiff has immediately passed into other employment on equally good terms.”

The second principle appears at page 526 and provides that:

“Any amount that the plaintiff ought to have earned where he could reasonably have obtained alternative suitable employment also falls to be deducted, and again may cause the loss incurred to vanish.”

8. The Board, in keeping with the second principle as enunciated above, has on many occasions denied compensation outright to the aggrieved employee where it is satisfied that no real attempt was made to secure alternate employment. (See for example, the *Cords Canada, Ltd.* case [1973] OLRB Rep. 429). Even when the aggrieved employee has been successful in ultimately obtaining employment elsewhere, the Board nevertheless has denied compensation for the period of time encompassing the aggrieved employee's initial delay in attempting to mitigate his damages. (See *The Ontario Society For The Prevention Of Cruelty To Animals* case [1973] OLRB Rep. 474). The question however as to the Board's application of the first principle would appear to be otherwise. Thus, in the *Norrena Electric Limited* case OLRB Rep. December 1968, 936, the majority of the Board, assessed compensation for the respective periods of unemployment of certain discharged employees, despite the fact that these employees earned more wages in alternative employment than they otherwise would have, had they remained at their previous employment during the whole period of time from the date of discharge to the date of reinstatement. Commencing at page 941, the majority of the Board stated as follows:

“17. Section 65(4)(a) (now Section 79(4)) of the Act provides, *inter alia*, that the Board, if it is satisfied that the person concerned has been discharged contrary to the Act, shall determine what the employer shall do or refrain from doing with respect thereto and such determination may include reinstatement in employment of the person concerned with or without compensation for loss of earnings and other employment benefits.

18. The compensation, if awarded, usually consists of a lump sum grossly calculated on the basis of the hours of work lost multiplied by the rate being earned at the date of discharge. The Board, however, requires the discharged employee to take steps to seek employment following discharge so as to mitigate or lessen his losses. If no effort at mitigation is made, the Board may refuse to order compensation. If a reasonable attempt to find alternative employment has been made but no work is available, the Board may award compensation on the basis

of the gross loss. Where employee has earned wages and the rate earned is less than that of his former job, the Board, applying the mitigation of damages principle, will modify the estimated loss by the amount earned by the employee during the period between the date of discharge and the date of the hearing. It will also order compensation from that date to the date of reinstatement at the employee's usual wage.

19. It is evident, of course, that the compensation for loss sought can only be for the sum actually lost. Thus, where a discharged employee obtains alternative work at equal or higher rates than that previously earned by him as did McKenzie, Dicaire and Taillefer in this case, the amount of the loss which he is entitled to claim is limited to the loss incurred between the date of discharge and the date of re-employment on the new job. He cannot be said to be accruing loss after that date. Where the claiming employee has made reasonable efforts to mitigate the loss claimed, he is entitled to compensation for such loss in full from the time the loss began until the time it ceased by reason of the new employment. In these circumstances, the date of hearing has no significance in the calculation of the loss which, as indicated previously, runs from the date of discharge to the date of re-employment. What occurs once the loss ceases to run is of no further concern to the Board in calculating the compensation for loss. To find otherwise would be simply to invite argument or postponement of the date of final calculation interminably on the speculation that earnings would eventually catch up with losses. Furthermore, it would seem a proper consideration to note that the higher earnings are made despite and not simply as the result of the improper discharge."

9. The minority position in the *Norrena Electric Limited* case (supra) is set out by Board Member Irwin and the relevant portions of his decision are reproduced herein as follows:

"3. Section 65(4)(a) (now Section 79(4) of The Labour Relations Act provides, *inter alia*, that the Board, if it is satisfied that the person concerned has been discharged contrary to the Act, shall determine what, if anything, the employer shall do or refrain from doing with respect thereto and such determination *may* include reinstatement in employment of the person concerned *with or without* compensation for loss of earnings and other employment benefits.

4. In the past, provided the aggrieved employee has made reasonable efforts to mitigate his loss of earnings by securing other employment, compensation, if awarded, usually consisted of a lump sum payment amounting to the gross loss in wages, if any, between what the employee would have earned on his previous job between the date of his discharge and the date of his reinstatement and what his actual earnings were in other employment, intermittent or continuous, during the same period.

5. The Board has stated in a number of decisions that Section 45 (now Section 51) of the Act, which pertains to the termination of bargaining rights, is not a punitive provision and is to be used as a shield and not as a sword. The same principle, I believe, applies to Section 65 (now Section 79). It is purely a remedial section and its purpose is to ensure that the position of the aggrieved employee has not been worsened as a result of his dismissal contrary to the Act. It is not intended as an instrument to inflict punishment upon the employer. Other sections of the Act are available for that purpose if such action is desired.

6. The aggrieved employees, Roger Dicaire and Rene Taillefer have suffered no loss of gross wages during the stipulated periods. Indeed, they have earned considerably more in wages than they would have earned if they had not been discharged by the respondent company and had remained in its employ during the same period. Where there has been no loss of wages, as here, surely the aggrieved employees are not entitled to compensation because there is no loss of wages to compensate for. To be consistent in applying the Board's policy in computing the loss of wages, if any, over the whole period from the date of discharge to the date of reinstatement, I would have directed that Dicaire and Taillefer be reinstated in employment with the respondent company but without compensation."

10. In the *Offset Make Up Limited* case OLRB M.R. December 1969, at p.1152, the Board was similarly confronted with the situation where the discharged employee earned higher wages in alternative employment. In that case, the employee, who did not seek reinstatement, obtained work one month after being discharged at a rate of pay one and one half times greater than that paid by his former employer. In assessing compensation for the period during which the discharged employee remained unemployed, the Board made no reference to the relevance of the increased wages at the second job.

11. It would therefore appear that the position of the Board, as reflected in Paragraphs #8 and #10 herein, is at variance with the position taken at common law and which was recently summarized by way of obiter by the Chief Justice of the Supreme Court of Canada in *Red Deer College v. Michaels and Finn* 75 CLLC ¶14,280, p.15,227, commencing at page 15,279, as follows:

"In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation. In *Payzu Ltd. v. Saunders*, [1919] 2 K.B. 581, at p. 589, Scrutton L.J. explained the matters in this way:

'Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same.'

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages."

12. There is no question that the Legislature in enacting the relevant provisions of Section 79 of the Act, has granted to the Board a very wide-ranging discretion and latitude with respect to the determination of compensation in situations where the Board is satisfied that the aggrieved employee has been discriminatorily dealt with by the employer contrary to the Act. In the instant case, this discrimination also took the form (at least insofar as Miss Reynolds' status was concerned) of a subsequent breach of an undertaking given to the Board on behalf of the respondent at the initial hearing of this matter on February 25, 1974.

13. In the particular circumstances of the instant case, we find no substantial reasons to depart from the reasoning as set out in the *Norrena Electric* case (supra). To find otherwise, would, in effect permit the offending employer to unduly profit from the innocent employee's industry. In addition, it would in our opinion generally tend to encourage recalcitrant employers in similar circumstances to delay matters on the basis that the greater the delay, the greater would be the reduction in back-pay liability. For the American experience in this regard, see the decision of the National Labour Relations Board in the *F. W. Woolworth Company* case (1950) 90 N.L.R.B. 289. Accordingly, and in answer to the question as posed in Paragraph #5 herein, we are not prepared to allow the higher wages earned by Miss Reynolds in alternative employment to offset the losses sustained during her intermittent periods of unemployment.

14. In the particular circumstances of this case and having regard to the Board's powers as set out in section 79(4) of the Act, we therefore determine that Miss Reynolds should be compensated by the respondent for loss of earnings in the amount of \$1,104.50 sustained by her during the periods of her unemployment extending from June 27, 1974 until August 20, 1974 and from June 9, 1975 to July 4, 1975. This determination is subject to the assumptions as set out by Counsel for the respondent in Paragraph #2 herein.

DECISION OF BOARD MEMBER F. W. MURRAY:

I dissent for reasons to be given later in writing.

6455-74-U George Magold, Tom Houston, & others, (Complainants) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (Respondent) v. The Electrical Power Systems Construction Association, (Intervener).

BEFORE: George W. Adams, Vice-Chairman, and Board Members E. Boyer and W.H. Wightman.

APPEARANCES: *W.G. Charlton and Paul Paradis for the complainants; A.M. Minsky for the respondent; H. Beresford and G.A. Pickell for the intervener.*

DECISION OF THE BOARD: October 6, 1975

1. This is a group complaint under section 79 alleging a violation of section 60. The complaint has been brought by fifty-four individuals.

3. The complainants allege that the respondent trade union "sign[ed] a collective agreement with The Electrical Power Systems Construction Association in full knowledge that the members were against it, and did thereby act in an arbitrary manner and in bad faith in not calling for a ratification vote".

4. For the purposes of this complaint it is sufficient to note the respondent trade union represents both employees who are employed by members of the Boilermaker Contractors' Association and employees who are employed by the members of the Electrical Power Systems Construction Association – the principal member of the latter association being Ontario Hydro. Thus in regard to these two employer associations there are two separate collective agreements. The collective agreement and bargaining relationship affected by this complaint is the respondent's collective agreement and bargaining relationship with The Electrical Power Systems Construction Association (hereinafter referred to as "EPSCA").

5. The *Labour Relations Act* R.S.O., 1970, c. 232 as amended by 1975, c. 76, section 60, reads:

60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

6. The parties agreed that only two of the complainants – H. Mitchell and K.L. Meredith – were employed with Ontario Hydro during the period relevant to this complaint. The other complainants would appear to have been employed under the respondent's collective agreement with the Boilermaker Contractors' Association, although the evidence suggests that the employers for whom these persons work are subcontractors of Ontario Hydro performing work at Ontario Hydro locations throughout Ontario. But be this as it may, the wording of section 60 stipulates that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of the employees "in the unit". The respondent and intervener submit that only those employees in the relevant bargaining

unit have status to invoke the section and that accordingly the complaints of those persons other than H. Mitchell and K.L. Meredith should be dismissed. The Board was referred to *Arthur Joseph Roberts and Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. Mar. 169 where at para 18 the Board observed:

18. We are satisfied that it was the intention of the Legislation to restrict the scope of a trade union's duty of fair representation to employees in a bargaining unit. It would be a forced interpretation of the word employee in section 60 for the Board to presume the contrary where the Legislature permits parties to the collective bargaining relationship under section 38(1)(a) of the Act to determine through negotiation the very conditions upon which the employer-employee relationship may be established. It is the Board's opinion that if the Legislature intended the scope of the trade union's duty of fair representation to extend beyond employees in a bargaining unit it would have done so in the clearest of language. The Legislature has given the Board a clear mandate with respect to granting relief against discriminatory hiring practices based on trade union activity. It has not done so for purposes of section 60.

But given our view of the merits of the complainant's request it is not necessary to consider whether the reasoning contained in this excerpt is apposite to at least this peculiar factual situation. (And see generally *Blouin Drywall Contractors Limited v. United Carpenters and Joiners of America, August 1975* – Ont. C.A. as yet unreported.)

7. The evidence establishes that Local 128 of the respondent trade union has a membership of between 1400 and 1500 persons and that during the relevant period only 130 to 150 of those persons were directly affected by the EPSCA negotiations. EPSCA is an employer association conceived to bargain with the Ontario Allied Construction Trade Council in the electrical power system section of the construction industry. This sector of the industry is a highly complex and important one and one which has been allocated a distinct and separate sector under the construction industry provisions of the *Labour Relations Act* (see s. 106(e)). The evidence suggests that one of the principal purposes of this particular relationship is to provide industrial relations stability and thereby assist Ontario Hydro in meeting the projected energy needs of the Province over the next decade. To this end EPSCA entered into a collective agreement with the Ontario Allied Construction Trades Council (hereinafter referred to as the "Council") effective from May 1, 1974 to April 30, 1984. The respondent trade union is a member of the Council and is therefore a party to the collective agreement.

8. It is interesting to note that the unusual ten year term of the agreement is not intended to foreclose access to economic sanctions for that period of time in that Article 32 of the master agreement reads:

TERM OF AGREEMENT

- 32.1 Subject to the Contract Reopener provision of this article this Agreement shall continue in full force and effect for a term of ten years, from

the first day of May, 1974, to the thirtieth day of April, 1984, inclusive, and thereafter it shall be considered automatically renewed for successive periods of ten years unless at least sixty (60) days prior to the end of any ten year period, either party serves written notice upon the other that it desires termination, revision or modification of any provision or provisions in this Agreement.

32.2 IN-TERM MEETINGS

Regular negotiating meetings will be scheduled during the first week of January, March, May, July, September and November, commencing in the second year of operation of this Agreement. The parties will meet for negotiation when written notice of the amendment or amendments prior to the date of the next regular negotiating meeting. The proposed amendment or amendments received less than thirty (30) days before the date of the next regular negotiating meeting will be dealt with at the next following regular negotiating meeting.

32.3 Proposed amendments to the master portion of this Agreement shall be negotiated by the Senior Bargaining Committees which are the executive officers of EPSCA and the Council respectively.

32.4 Proposed amendments to the Appendices to this Agreement shall be considered by the Trades Bargaining Committees named by the Board of Directors of EPSCA and the Officers of the Council. Amendments agreed upon through Trade Appendix negotiations are subject to approval by the EPSCA Board of Directors and the Officers of the Council.

32.5 The proposed amendment or amendments agreed upon in writing at the bargaining sessions provided above will be incorporated as a revision on the date agreed to by the EPSCA Board of Directors and the Officers of the Council.

32.6 CONTRACT REOPENER

If the parties fail to reach settlement through the process of negotiation described above, the proposed amendment or amendments may be submitted by either party to the other sixty (60) days prior to the second or each succeeding anniversary date of the Agreement. When such a request is submitted by either party, the Agreement will automatically become open at such anniversary date for negotiation of the submitted amendment or amendments. If agreement cannot be reached, the parties may refer the matter to conciliation and the provisions of The Labour Relations Act shall apply as it would on the final anniversary date. All provisions of this Agreement will continue to operate until:

(a) agreement is reached on the disputed provision or provisions, or

- (b) until conciliation procedures have been concluded and either party may, under The Labour Relations Act of Ontario, resort to the sanctions provided under the Act. If settlement is not reached by the time the conciliation procedures have been concluded, this Agreement will be conclusively deemed to have been terminated.

32.7 Any changes to this Agreement or any renewal or successor Collective Agreement will be confined to the specific amendments in respect of which submissions were made under Article 32.6.

9. The respondent trade union holds the bargaining rights for the members of Local 128 employed under the EPSCA agreement. The application for membership which is signed by all members of the respondent and its subordinate locals reads, in part:

OFFICIAL APPLICATION FOR MEMBERSHIP

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers

I understand I am not to become a member or entitled to any right or benefit as a member until I have tendered the full amount of the applicable fee to a duly authorized local lodge officer or representative, and my application has been received and approved by the office of the International President and recorded in the office of the International Secretary-Treasurer. I hereby authorize the International Brotherhood or a subordinate body thereof to represent me in all matters pertaining to wages, hours and working conditions, *and I agree to abide by the laws of the International Brotherhood and such subordinate body.* [emphasis added]

Thus all members of the respondent agree to abide by the union's laws as well as those of its subordinate bodies. And it is important to note that neither the constitution of the respondent nor the bylaws of Local Lodge No. 128 provide for a mandatory ratification vote of all proposed collective agreements. There is therefore no constitutional right to the relief requested by the complainants.

10. John Carroll, an International Vice-President of the respondent responsible for the respondent's interests in Eastern Canada and the respondent's representative in the EPSCA negotiations, testified before the Board. He explained the concept of the EPSCA agreement to the Board and indicated that the idea was first discussed publicly in 1971. There then followed two and one-half years of negotiations, consisting of over 130 meetings between the various parties, before the master EPSCA agreement was agreed upon. Concurrently, each of the trades covered by the master agreement negotiated a separate schedule of conditions to be appended to the master agreement and Carroll testified that a committee consisting of himself and three representatives of Local 138 negotiated the "Boilermaker appendix" with the EPSCA representatives. These latter negotiations consisted of twelve meetings. The complete EPSCA agreement (the master portion and the trade appendices) was formally executed on August 28, 1974.

11. Carroll testified that throughout the period of both negotiations, the EPSCA concept and the progress of the negotiations were often discussed and reported upon to both Local 128's executive and its general membership. In support of this testimony Mr. Stanley Petronski, business manager for Local 128 during the relevant period, recited the minutes of a number of executive and regular monthly meetings convened by Local 128 where EPSCA matters were discussed. Such regular monthly meetings, by virtue of Article VIII of the Local 128's bylaws, are held at 7 Queen Elizabeth Blvd., Etobicoke, Ontario on the fourth Wednesday of each month. We are satisfied that neither Petronski nor Carroll encountered any significant or unusual opposition to the EPSCA negotiations at these meetings or at any time during the two and one-half years preceding its execution. Carroll also testified that early on in the negotiations, at one of the monthly meetings; he was asked whether the membership would be allowed to ratify the EPSCA agreement and he answered in the negative. There was no evidence that his response generated opposition and no evidence of an attempt by any member to have either Carroll's decision reviewed or the constitution of the respondent amended to specifically provide ratification.

12. Finally before signing the agreement on August 28, 1974, Carroll and Petronski travelled to the Douglas Point, Lennox and Nanticoke locations of Ontario Hydro covered by the agreement to explain it to the affected members. As mentioned above, the agreement applied to approximately 130 to 150 members of the respondent who were employed by Hydro at the time. Fifteen members were employed at the Lennox location; approximately one hundred and thirty were employed at Douglas Point; and six or seven members were employed at Nanticoke. Apparently the meetings at Nanticoke and Douglas Point proceeded without incident but the meeting at Lennox was of a more volatile nature and appears to have spawned the present complaint. While only fifteen members of the respondent were employed by Ontario Hydro at the Lennox location the meeting there was attended by approximately 140 persons. It would appear that the additional persons were members of Local 128 employed by subcontractors to Ontario Hydro working at the Lennox location. The reason for their attendance was explained to the Board by witness William Rennie. Rennie attended the meeting and is a member of the respondent employed by one of the subcontractors – Combustion Engineering. Although Rennie admitted that he was employed under the collective agreement between the respondent and The Boilermaker Contractors' Association, it was his belief that he and others like him had an interest in the EPSCA agreement because Ontario Hydro was the largest employer of boilermakers in the Province. Accordingly, he might be employed under the agreement in the future. In fact we might note that the respondent has itself, at least partially, recognized such an interest by permitting members of Local 128, other than employees employed by Ontario Hydro, to participate in the negotiation of the Boilermaker appendix to the EPSCA agreement. Rennie went on to testify that at the outset of the meeting, before the EPSCA agreement was explained, he asked Carroll if the membership was going to be allowed to ratify the agreement. When Carroll replied in the negative Rennie got up and walked out along with approximately 100 other persons then in attendance. The Board notes that Rennie, and the other complainants who testified before the Board, know very little about the EPSCA agreement and admitted that they did not attend union meetings on a regular basis. However, the following memorandum purportedly distributed to all members of Local 128 was produced and Rennie seemed to suggest that the letter had not been complied with and that this fact both explained his lack of knowledge and supported his request for a ratification vote. The memorandum reads:

TO ALL MEMBERS OF BOILERMAKERS UNION, LOCAL 128

A written request for a Special Called Meeting of the Membership of Local 128 has been filed with this office by members employed by the Nanticoke Hydro Project, to discuss the upcoming E.P.S.C.A. (Electric Power System Contractors Association) Agreement.

Please be notified that I have been in conversation with the International Vice President, Mr. John D. Carroll and he has assured me that as negotiations continue with the Contractors, Special Information Meetings will be set up by Business Manager Dennis Ryan and Himself, at all major Hydro Sites, for the purpose of informing the members employed there.

Thereafter, when a tentative Agreement is reached by the Committee a Special Mass Meeting will be held for the Membership, at a time and place to be designated.

Therefore, the request for a Special Meeting will be held on file and will be implemented when it is deemed appropriate.

Trusting this meets with your approval, and with best wishes, I am,
Fraternally yours,
(SGD) "A.J. Cormier"
President
Local Union, 128

13. Following the meeting at the Lennox location, Mr. W.G. Charlton was retained by the complainants and Mr. Charlton testified that on August 27, 1974 he sent the following telegram to Ontario Hydro, EPSCA and Carroll:

TAKE NOTICE THAT 300 MEMBERS OF LOCAL 128 HAVE INSTRUCTED THIS FIRM TO TAKE PROCEEDINGS AGAINST JOHN CARROLL, INTERNATIONAL VICE-PRESIDENT, TO ENJOIN HIM FROM SIGNING ANY E.P.S.C.A. AGREEMENT ON BEHALF OF THE BOILERMAKERS. GOVERN YOURSELF ACCORDINGLY.

14. Mr. Carroll told the Board that he did not receive and had no knowledge of the telegram before signing the EPSCA agreement on August 28, 1974, and no evidence was called by the complainants to suggest otherwise. However, Mr. Carroll admitted that had he received the telegram before signing, he would have signed the EPSCA agreement as he did (although he might have held another meeting before doing so). Carroll explained that since 1946 it has not been the respondent's policy to employ ratification votes.

15. Finally, the respondent, through Petronski, adduced a memorandum written by the business agent explaining and endorsing the EPSCA concept. The memorandum was read to a regularly scheduled membership meeting convened on July 18, 1974.

16. The respondent submitted that it holds the bargaining rights for the members of Local 128 employed by Ontario Hydro and that the members of Local 128, being members of the respondent, have obligated themselves to abide by the constitution of the respondent and the bylaws of Local 128. These two documents, it was argued, do not entitle the members to the requested ratification vote and throughout the entire period in question Mr. Carroll acted within the terms of both documents. Counsel for the respondent took the position that the complaint was based upon rumour and innuendo that were without foundation and which could have been avoided had the complainants attended membership meetings. In other words the complainants' ignorance of the EPSCA concept had been self-inflicted. He further suggested that the EPSCA agreement is of such a complex nature that the complainants had put themselves and the respondent in an impossible position by delaying their opposition as long as they did.

On another level, counsel stressed that the Board must have regard to the practical requirements of collective bargaining. In the facts at hand the bargaining had occurred over two and one-half years; members of Local 128 had been directly involved in the negotiation of the Boilermaker appendix; numerous membership meetings had considered the progress of the bargaining; and the business agent of Local 128 had endorsed the tentative agreement. All the complainants knew of the respondent's policy in regard to ratification procedures and they took no steps during the two and one-half years to change the policy or to appeal the policy in any way. It was submitted that by granting the requested relief under section 60 in these circumstances the Board would be ignoring the industrial community's need for decisiveness and imposing a highly intrusive and unrealistic obligation upon trade unions.

17. Having regard to all of the evidence we have no hesitation in deciding that the respondent has not violated section 60. There is no evidence that the respondent negotiated the EPSCA agreement in an arbitrary, discriminatory or bad faith manner. The negotiations took place over a lengthy period of time and ample opportunity was afforded to all of the complainants to ascertain the content of the tentative agreement and to discuss its feasibility. Debate was in no way stifled and the members of Local 128, through Mr. Petronski and two other members, played an important role in the negotiations.

18. This is not a case where a majority or significant minority of the employees entitled to relief under section 60 clearly, unequivocally and in a timely manner voiced their opposition to the signing of a collective agreement whereupon the bargaining representatives, in the face of such opposition, proceeded to execute the agreement and totally ignore the opposing viewpoint. In such circumstances there may be some merit to the relief requested in this case but we do not have to consider this question.

19. As for the respondent's policy in regard to ratification procedures, generally we do not believe that the wisdom of the policy is a matter to be reviewed under section 60. As exclusive bargaining agent a trade union is given the right and obligation to bargain with an employer in regard to the terms and conditions of employment to be applied to the employees in the affected bargaining unit. While the employees are expressly bound to a collective agreement by legislation (see section 43) the employer and the trade union are the parties to the agreement (see sections 37(2), 41 and 42). Having regard to these provisions of the legislation it seems clear that formal ratification is not required by law to make a collective agreement binding. While the union is legally required to follow the procedures prescribed

in its constitution, the choice of procedures is for the union. The legislation gives no preference to any special method of approval or ratification – a fact illustrated by the terms of subsections (4) and (5) of section 63 which read:

63. – (4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that a person expressing his choice cannot be identified with the choice expressed.

(5) Any vote mentioned in subsection 4 shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

Clearly these subsections are written in a manner that makes them operative only when a trade union decides that a vote to ratify a proposed collective agreement is to be taken. Thus it can be said that legally the function of ratification is to make an agreement binding, but it is required only when the union has so prescribed.

20. But all of the foregoing is not to deny the value of ratification procedures. It can be argued that the function of ratification is, in simplest terms, to test the acceptability of the proposed collective agreement to those who are to be governed by its terms and conditions. Such acceptability of the agreement is not only an articulate ideal, but a practical necessity in our collective bargaining system. In this regard it has been said that the procedure fulfills the underlying democratic purpose of our system, protects the integrity of the trade union and increases the employer's assurances of stability. (See Clyde W. Summers, *Problems of Ratification* (1971) at p. 17 and p. 55.) As for the argument that ratification procedures tend to impede the bargaining process to the detriment of the very people it seeks to inform, Professor Summers of the Yale Law School has had this to say:

Ratification by vote of the members need not significantly impede the bargaining process or lead to economic conflict, nor need it obstruct arriving at economically responsible agreements. Union members are capable of understanding adequately the central issues in the bargain if they are fully informed; and on technical or complex aspects, they are willing to follow the guidance of their negotiators if there is firm and effective leadership. Members seldom reject contracts because the package is too small; they reject rather because certain changes and protection, often of nearly no economic cost have been unexplainably bypassed, or because they believe the benefits have been unfairly distributed. Automation can be made acceptable if it does not cause too rapid shrinkage in jobs and some fair provision is made for those eliminated. Of course, negotiators who are not answerable to the members either through the ratification process or through internal union processes can make bargaining less cumbersome, forestall authorized strikes, and reach agreements which give greater consideration to the economic position of the employer. John L. Lewis was able in 1950 to agree to mechanization of the mines and thereby obtain full-time work at high wages for the workers in those mines mechanized, probably only because he was not subject to democratic check. However, the his-

tory of bargaining in the coal industry in the preceding ten years provides less than a persuasive argument that collective bargaining will be more responsible when the negotiators have full power to make agreements binding. Nor have the visible social consequences of mine mechanization placed beyond question that the negotiator's unchecked judgment will be better than when it is checked by those for whom he negotiates.

But even if collective bargaining works more smoothly and to better economic results when placed in the hands of experienced and informed negotiators free from membership control, that alternative is not open. The union is a political institution in which the members are free to criticize, organize opposition and choose those who act in their behalf. This democratic process is now legally protected and these rights have become increasingly asserted by union members. Direct democratic participation through ratification votes adds no substantially greater problems to the collective bargaining process than grow from indirect participation through election of officers and negotiators. Indeed, collective bargaining probably works better when it is channelled separate from the other political process of the union.

In fact, based upon Mr. Petronski's report to the membership dated July 24th, 1974, it would appear that the respondent has agreed to permit the members working under the EPSCA agreement to ratify proposed changes to the appendices in the future.

21. But as we have said, section 60 is not designed to impose internal procedures upon trade unions because the Board believes them to be most congruent with effective collective bargaining. Such an approach would be an unwarranted intrusion into the internal affairs of trade unions – and an intrusion that could only be supported by a strained interpretation of section 60.

22. Therefore for all of these reasons the complaint is dismissed.

0663-75-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. **Duplate Canada Limited**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: George W. Adams, Vice-Chairman, and Board Members F.W. Murray and P.J. O'Keeffe.

APPEARANCES: *Webster Cornwall* for the applicant; *J.W. Healy, E.M. Seysmith, J.P. Clements* and *M.P. Moreau* for the respondent; *Raymond L. Brunet* for the objectors.

DECISION OF THE BOARD: October 6, 1975

4. The applicant seeks to represent “all clerical, office and technical employees of Duplate Canada Limited, Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, private secretary to the plant manager, secretary to the industrial relations manager, and secretary to material control manager”. The respondent proposed that the appropriate bargaining unit ought to be defined as “all office, clerical and technical employees of Duplate Canada Limited at its plant in Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the plant manager, secretary to the material control manager, employees in the Personnel and Industrial Relations Department, security guards and students employed during the school vacation period”.

5. The Board was informed that the respondent had a history of employing students during the vacation period and that it intended to pursue this practice. Therefore that aspect of its proposal is accepted. We also note if the security guards fall within section 11 of *The Labour Relations Act* there is no need to exclude them from the bargaining unit being considered in this application and therefore this aspect of the respondent’s proposal is to be deleted.

6. This leaves the respondent’s request that “employees in the Personnel and Industrial Relations Department” be excluded from the bargaining unit. The Board was informed that only the industrial relations manager and a secretary were employed in this department but the respondent argued that the applicant’s proposal – one that specifically excluded these two individuals – was inadequate in light of the recent decision of the Divisional Court in *Re Miller et al and Algoma Steelworkers Credit Union Ltd. et al* [1974] 6 O.R. (2d) 676.

7. In *Re Miller et al and Algoma Steelworkers Credit Union Ltd.* the United Steelworkers of America had entered into a collective agreement with Algoma Credit Union Ltd. (the credit union) and the recognition clauses of the agreement read:

- 2.01 The Employer recognizes the Union as the sole bargaining agency for all its employees save and except the Manager.
- 2.02 The terms and conditions set forth in this agreement shall have full force and effect for all employees in the bargaining unit as described in the preceding paragraph.

It is of note that this collective bargaining relationship arose by way of voluntary recognition and not by certification before this Board. Subsequently and as a result of the substantial growth in its business, the credit union created a new position of assistant manager and the union took the position that the person appointed to that position was part of the bargaining unit. The credit union disagreed and the matter was referred to arbitration under the agreement.

The board of arbitration relied upon section 1(3)(b) of *The Labour Relations Act* in dismissing the grievance, concluding that the person in question exercised managerial and confidential functions for the employer. As noted by the Divisional Court the board of arbitration defined the issue before it in the following way:

Simply put, was Miss O'Connor exercising such function that she was in a managerial or confidential capacity. If so, she would not be deemed an employee for the purpose of the Labour Relations Act, or for this Grievance.

The majority then referred to a number of decisions interpreting the words "managerial functions" and "confidential capacity" and concluded their judgment in this way:

I believe Miss O'Connor performs managerial and confidential functions for the employer. I believe the amount of Bargaining Unit work she now does is minor. Article 2.01 simply defined the Bargaining Unit with regard to all employees at that time. It does not prevent the employer from creating new positions that are properly managerial in function.

The grievance procedure is not appropriate to regulate a position which is occupied by a person who is not an employee within the meaning of the Labour Relations Act. The grievance procedure is not appropriate to regulate a position which is occupied by a person who is not an employee within the meaning of the Labour Relations Act. The grievance procedure is, however, proper to apply in determining whether or not such a position, or employee, is or is not a member of the Bargaining Unit. In the instant case Miss O'Connor, or any person occupying the position of assistant manager as presently constituted, would not be a member of the Bargaining Unit and the Grievance is therefore dismissed.

8. On the other hand the Divisional Court saw the question before the board of arbitration in the following terms:

This question was: Would the person filling the newly-created position of assistant manager be included in the employees comprising the bargaining unit so that the provisions of the collective agreement would have to be complied with in making the appointment? Or putting the matter in a different way: Would the person filling the newly-created position of assistant manager come within the stated exclusion from the bargaining unit of "manager" so that the provisions of the collective agreement would not have to be complied with in making the appointment?

It went on to conclude that the board had therefore failed to deal with the question submitted to it and in this regard it wrote:

Instead of directing their minds to this question, the majority decided the question whether or not a person performing the function of assistant manager would be an employee as defined in s. 1(3)(b) of the *Labour Relations Act*. This was not the question that the Board was asked to decide.

There is nothing in the *Labour Relations Act* which provides that a voluntary collective agreement which covers persons other than employees defined in the *Labour Relations Act* is invalid; *Canadian Industries Ltd. v. Int'l Union of District 50, Allied & Technical Workers of United States and Canada, Local No. 13328*, 72 C.L.L.C. 14,612; reversed on other grounds [1972] 3 O.R. 63, 27 D.L.R. (3d) 387. Furthermore, s. 1(3)(b) of the *Labour Relations Act* does not say that no person shall be deemed to be an employee under a collective agreement who exercises managerial functions or is employed in a confidential capacity; rather, it provides that no person shall be deemed to be an employee for the purposes of the Act who in the opinion of the Board (i.e., the Ontario Labour Relations Board) exercises managerial functions or is employed in a confidential capacity. What decision the Ontario Labour Relations Board might, or might not, have arrived at concerning the position of assistant manager is an unknown factor and is irrelevant in interpreting art. 2.01 of the agreement. In my opinion, it was quite improper for the board of arbitration in the application before it to have entered into a consideration of that question; this was a matter within the exclusive jurisdiction of the Ontario Labour Relations Board. The question for the arbitration Board was whether or not the assistant manager was covered by the collective agreement; this was properly a matter for arbitration and was quite separate from the question that might arise before the Ontario Labour Relations Board under s. 1(3)(b) of the *Labour Relations Act* : *Re C.U.P.E., Local 1000, and Hydro-Electric Power Com'n of Ontario* (1971), 23 L.A.C. 111; *Office Employees Int'l Union Local #87 (Applicant) v. Canadian Car Fort William Division Hawker Siddeley Canada Ltd. (Respondent)* (Labour Relations Board File No. 10386-75-M).

9. As a result of this reasoning counsel to the respondent submitted that section 95(2) of *The Labour Relations Act* was no longer of assistance in defining the relationship of post-certification increases in an employer's managerial staff to the scope and application of a collective agreement. In his opinion, *Re Miller and Algoma Steelworkers Credit Union Ltd.* precluded a board of arbitration from considering the status of such persons under *The Labour Relations Act* and he reminded the Board of its own policy under section 95(2) by which it declines to determine the coverage of a collective agreement. Thus it was his submission that because of the Board's policy under section 95(2) in combination with the principle applied in *Algoma Steelworkers Credit Union*, the applicant's proposed exclusions would cause all future increases in the personnel of the Industrial Relations Department to "fall" into the bargaining unit despite the almost inevitable fact that these persons will exercise either managerial or confidential functions within the meaning of *The Labour Relations Act*. He therefore requested a broader exclusion than it has been the Board's practice to give.

10. While we share the respondent's concern its proposed solution causes us an equivalent if not greater concern. With respect to managerial personnel the Board's policy has been not to exclude persons in a managerial classification which is not occupied or does not exist at the time of the application but rather to exclude only those persons employed in the lowest managerial classification at the time the application is made.

This policy is based upon the view that persons ought not to be denied the benefits of collective bargaining except when their duties and responsibilities bring them within the specific exclusions provided for in section 1(3)(b) of *The Labour Relations Act*. This important determination should not be made in the abstract but with regard to the actual duties and responsibilities of the persons in question. If such people are not employed at the date of application the Board is being requested to resolve a hypothetical question – a request the courts refuse to entertain for reasons of adjudicative integrity – and to the extent that such a determination fails to embrace the actual duties and responsibilities of future personnel the Board will thereby have denied them the benefits of the Act without a hearing. Thus the Board may be wedded to this policy for reasons of natural justice.

11. However, even if we possess the discretion to do as the respondent requests, the Board needs a clearer indication of the necessity to do so than can be found in the *Algoma Steelworkers Credit Union* case.

12. First, the case might be distinguished from the facts at hand. In that case the Court observed that “[t]here is nothing in the *Labour Relations Act* which covers persons other than employees as defined in the *Labour Relations Act* is invalid”. If the learned jurist is correct, it could be said that he was basing the proposition on the “voluntary” agreement of parties and it would appear that in that case the collective bargaining relationship was a product of voluntary recognition and not the result of an application for certification before this Board. With this emphasis on the facts and again assuming but without deciding that managerial or confidential personnel can be covered by a collective agreement on the agreement of the parties, it might reasonably be said that a board of arbitration that only concerns itself with the meaning of section 1(3)(b) of *The Labour Relations Act*, and thereby ignores the intent of the parties, “has failed to deal with the question submitted to it”. In other words, it is not clear that Mr. Justice Houlden would have considered the section 1(3)(b) analysis “irrelevant” or “improper” had the recognition clause been the unaltered product of a certificate granted by this Board.

13. Secondly, the *Algoma Steelworkers Credit Union Ltd.* case is based on the premise that *Canadian Industries Ltd.*, 72 C.L.L.C. ¶14,612, decided that “[t] here is nothing in the *Labour Relations Act* which provides that a voluntary collective agreement which covers persons other than employees as defined in the *Labour Relations Act* is invalid”. However, in *Canadian Industries Ltd.* the employer, prior to obtaining the services of Pinkerton’s of Canada Ltd., had agreed to the inclusion of security guards in a bargaining unit defined in terms of “any person employed at the said works, who is paid an hourly rate”. Section 11 of *The Labour Relations Act* reads:

11. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers’ organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

A purposeful reading of section 11 makes it clear that the Board cannot require an employer to bargain with a trade union of security guards that does not insulate itself as the provision requires, but it is equally clear that security guards, in contrast to persons excluded by section 1(3)(b), are employees for the purposes of *The Labour Relations Act*. Furthermore, there are no sections similar to section 12 and section 56 that pertain to security guards. Thus because *Canadian Industries* does not support the proposition for which it was relied upon, the authority of the *Algoma* decision is severely undermined.

14. Thirdly, if the respondent's submissions in regard to *Algoma Steelworkers Credit Union Ltd.* are well founded the remedy may be in the Board changing its practice under section 95(2) or at least in having the courts review the Board's interpretation of that section in light of the *Algoma* decision. The court of Appeal in *Canadian Industries Ltd.* expressly left open the question of whether a determination under section 95(2) is final and conclusive "for all purposes of the Act and of any collective agreement" or simply "for all purposes of the Act".

15. Finally, the kind of problem raised by the respondent is one that might be considered in collective bargaining and apt wording agreed upon to guard against a possible consequence that should be as of much concern to the trade union as it is to the respondent.

16. Therefore, having regard to the Board's practice and the submissions of the parties, we find that all clerical, office and technical employees of Duplate Canada Limited, Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, private secretary to the plant manager, secretary to the industrial relations manager, secretary to the material control manager and students employed during the school vacation, constitute a unit of employees appropriate for collective bargaining.

17. A statement of desire was filed in opposition to the application bearing the signatures of three persons purporting to be employees of the respondent. One employee attended at the hearing and told the Board that he did not decide to oppose the trade union until August 29th but then he fell ill and was off work the following two days. He requested that the terminal date be extended or a representation vote be ordered.

18. This application was filed on July 24, 1975 and the terminal date was extended to August 22, 1975. Accordingly, the employee in question had ample time to formulate his position. Moreover, despite his sickness, other employees in support of his position could have circulated the statement of desire in his absence. Finally, these considerations cannot generally support the kind of request being made. To a large extent they are unavoidable and there is no way of assessing whether the enlisted support for the statement of desire would be any different. Against this must be balanced the delay associated with such a request and an applicant's right to outright certification. For all of these reasons the request for an extension of the terminal date or a representation vote is denied. And because there is an insufficient overlap between the membership evidence and the statement of desire, the statement of desire is dismissed as well.

19. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on July 24, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of

The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A certificate will issue to the applicant.
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0130-75-U Canvin Products Limited, (Applicant) v. Vernon Passerino, Hugh McKnight and Robert Clark, (Respondents).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and J.E.C. Robinson, Q.C.

APPEARANCES: *R. C. Fillion and B.F. MacDonald for the applicant; Jeffrey Sack, H. Goldblatt and A. Carstairs for the respondents.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER J.E.C. ROBINSON, Q.C. October 1, 1975

1. The Board consents to the institution of prosecution of Vernon Passerino, Hugh McKnight and Robert Clark for the following offence alleged to have been committed:

That commencing on or about the 21st day of April, 1975, and continuing to and including the 22nd day of April, 1975, each of them did support or encourage an unlawful strike contrary to the provisions of section 65 of *The Labour Relations Act*.

2. The appropriate documents will issue.

DECISION OF BOARD MEMBER OLIVER HODGES:

1. I dissent.
2. In my opinion, the evidence presented by the parties does not support a finding that the aforementioned trade union officers did counsel, procure, support, or encourage an unlawful strike. In fact, the evidence points to a finding that the trade union officers did not participate in the unlawful strike, and instead took the responsible stance of doing everything in their power to discourage the employees from taking this course of action. The evidence establishes conclusively that the officials of the union at all times stigmatized the strike as unlawful and sought to induce the employees to return to work.
3. The trade union officers concerned did not favour the walk-out and once the strike did break out their efforts were directed to hastening the return to work and the re-establishment of an orderly bargaining relationship. The officers conducted themselves throughout in a manner calculated to enable them to regain the confidence of the employees so that they could persuade them to return to work.

4. In a recent arbitration case, *Ontario Steel Products Ltd.* (1972) 24 L.A.C. 60 (Brandt), the arbitrator noted that the evidence before him established that the grievors, trade union officers, had attempted unsuccessfully to end an unlawful walk-out. He stated:

Rather than being inactive and lending tacit approval to the strike they were, within reasonable grounds, actively attempting to bring it to an end. It is true they did not succeed, but to hold them liable on that account is to convert them into a kind of insurer that all disputes will be settled without a work stoppage. Clearly they are not under such a burden to succeed.

5. In this instance, the trade union officers clearly made active attempts to bring an end to the unlawful work stoppage and by granting the application for consent to prosecute against them the majority decision is in effect putting trade union officials in the position of insurers that unlawful work stoppages will not take place – a conclusion with which I cannot agree.

6. Many arbitration cases have held that it is the duty of a union official to set a good example and to take a positive, active position to use his powers of persuasion to keep employees from walking off the job illegally. (See *Robin Hood Flour Mills Ltd.*, (1967) 18 L.A.C. 293 (Arrell)). What is more, many cases have held that trade union officials occupy a position of special responsibility and leadership and that participation of a trade union official in a breach of the collective agreement warrants a more serious punishment than the same conduct might bring upon an ordinary member of the bargaining unit because of this greater responsibility. (See, for example, *Re Churchill Forest Industries (Manitoba) Ltd.*, (1973) 2 L.A.C. (2d) 361 (Ferg); *Galt Metal Industries*, (1971) 23 L.A.C. 33 (Egan); *M. Loeb (London) Ltd.*, (1971) 23 L.A.C. 215 (Rayner); *Kenora Districk Home for the Aged*, (1967) 18 L.A.C. 381 (Arthurs); *Ford Motor Co.*, (1964) 14 L.A.C. 303 (Cross); *Triangle Conduit & Cable (Canada) Ltd.* (1966) 17 L.A.C. 408 (Hanrahan).)

7. If it is important for the orderly functioning of labour relations that trade union officials take on this role of greater responsibility, then surely when trade union officials act responsibly and take it upon themselves to persuade their fellow-members to return to work, the Labour Relations Board should provide encouragement. To grant applications for consent to prosecute in the face of such behaviour will discourage precisely the kind of actions the Labour Relations Board should be fostering, and will certainly contribute in some measure to increased labour strife.

0250-75-U The Lummus Company Canada Limited, (Applicant) v. Rudy Sabourin, et. al. (Respondents).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and F.W. Murray.

APPEARANCES: R. C. Fillion and R. C. Boulton appearing for the applicant; L. C. Arnold, Harold Douglass and John Violette appearing for the respondents.

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER F. W. MURRAY: September 30, 1975.

1. The applicant has applied to the Board for consent to institute a prosecution of the respondents for offences under The Ontario Labour Relations Act.
2. The respondents have disputed the jurisdiction of the Board to entertain this application and have alleged that the labour relations of the applicant fall within the jurisdiction of the Parliament of Canada.
3. The evidence before the Board establishes that the applicant is engaged in the construction of a petrochemical plant at Corunna, Ontario. When the plant is completed it is intended to produce ethyl from a supply of crude oil which will be transported into the plant by means of a pipeline which originates from a point outside the province of Ontario.
4. The respondents argue that the production of ethylene will be produced as a refining process and is an integral part of the operation of a pipeline which originates from a point outside the province of Ontario. At this point we observe that there is no evidence before the Board concerning whether ethylene will in fact be produced at the proposed Plant from crude oil. However, for the purposes of argument; we shall assume, without deciding, that ethylene is to be produced at some future time at the proposed plant and that ethylene is produced from crude oil.
5. The respondents conclude that the construction of the proposed plant is an integral part of a work and undertaking which connects Ontario with any other or others of the provinces, or extends beyond the limits of the province of Ontario. In support of their position the respondents relied on the following cases: *Northern Electric Co. Ltd. v. Ontario Labour Relations Board et al* 70 CLLC ¶14,016; *Schwenger Construction Limited* OLRB M.R. February 1965, p. 576; *Robertson-Yates Corporation Limited* OLRB M.R. October 1962, p. 215 and *In the Matter of a Reference as to the Validity of the Industrial Relations and Disputes Investigation Act, ... and as to its applicability in respect to certain employees of The Eastern Canada Stevedoring Company Limited* [1955] 3 D.L.R. 721.
6. In the *Robertson-Yates Corporation Limited* case and in the *Schwenger Construction Limited* case, the Ontario Labour Relations Board determined that it did not have jurisdiction to entertain certain applications for certification. However, the Board did not state under which headings of sections 91 and 92 of The British North America Act it determined the question of jurisdiction. The former case involved the construction of certain structures at the Canadian Terminus of a bridge at Niagara Falls. These structures consisted of a terminal and approaches, including a port of entry into Canada with customs and immigration installations, a customs compound and warehouse, toll lanes and toll booths. In the latter case the employer was involved in the modification and reconstruction of a portion of the Welland Canal twinning project. Both of these decisions are readily distinguishable from the apparent facts of the instant application.
7. In the *Northern Electric Co. Ltd.* case, the Supreme Court of Ontario held that the Ontario Labour Relations Board was without jurisdiction where the employer's customers operated lines of communication which extended across provincial boundaries they were subject to the legislative jurisdiction of the Parliament of Canada by virtue of section

92(10)(a) of The British North America Act. The court reasoned that the employer's installation operation formed an integral part of the operation of at least its principal customer, Bell Telephone Company, and that the employer operated, if only on a temporary basis, a line of communication which extended across provincial boundaries. The court concluded that the labour relations of its installation operations were not governed by The Labour Relations Act of the province of Ontario. This decision, however, involved the consideration of the operation of a line of communication which extended across provincial boundaries. If the analogy were extended to the instant application it would arguably apply to the construction of the pipeline. However, in the instant case we are not dealing with the construction of a pipeline which is said to connect Ontario with any other or others of the provinces, or extending beyond the limits of Ontario. We are dealing with the construction of a plant which is said to involve the use of oil from such a pipeline.

8. The *Eastern Canada Stevedoring Company Limited* case considered the applicability of the Industrial Relations and Disputes Investigation Act to the employees of a company which was in the business of supplying stevedoring and terminal services to shipping companies which operated on regular schedules between ports in Canada and ports outside Canada. In that case the majority of the Supreme Court of Canada held that the employment relations with the stevedoring company was governed by the Industrial Relations and Disputes Investigation Act. Various lines of reasoning are set forth in that decision.

9. In the instant case, the proposed plant which is being constructed is, on the evidence before us, neither within the subject matters referred to in section 92(10)(a) of the British North America Act nor an integral part of the subject matters referred to in section 92(10)(a). In our view, the construction of the plant within Ontario is a local work and undertaking under provincial jurisdiction and the labour relations of the employees who are engaged in constructing the plant are governed by The Labour Relations Act of Ontario. We find that the Board has jurisdiction to entertain this application.

10. The parties made representations to the Board on the subject of the discretion of the Board under The Labour Relations Act to grant its consent to institute prosecutions. We do not wish to comment on the representations of the parties because we are granting the consent of the Board to institute prosecutions. We have considered the representations of the parties and consider it appropriate as set forth below to grant the consent of the Board in the circumstances of this application.

11. Having regard to the evidence and representations of the parties, we are satisfied that arguable points of law and fact exist. In these circumstances, we consent to the institution of a prosecution against the respondents for the following offences alleged to have been committed:

That on May 8, May 9, May 12 and May 13, 1975, Rudy Sabourin, John Violette, Wayne Coutts, Roy Southwell, Larry Reeleeder, Reg R. Pretty, Paul Violette, Reed Couture, Stan Slack, Earl Bjornson, Grant Jarvis, Howard Hetherington, Bill Bsbula, Erik Olsen, Harry Mortimer, James Trayler, Thomas Bradley, Marc Boulanger, Alden Morningstar, Glenn Smith, Thomas Vansickle, Lloyd McCabe, John Buckle, Ed Gammon, Dave Dixon, Bernard Hodgins, Klaus Bruckmann, Terry Phibbs, Walter Penter, Robert Plaine, John Houle, Ed Dekeluer, Rob-

ert Martin, Gerald Robillard, Ed G. Hyde, Al Pretty, Lloyd Young, Dwight Barber, Dan Coleman, Doug Dodge, Jerry Cushman, Basil Dew, Richard King, Brian Gould, Victor Villeneuve, Stephen Bradley, Patrick Colombo, Alec Brander, Jacques Lacasse, Robert Humphries, Garry Hodgins, and Mike Simmons did at Corruna in the Township of Moore in the County of Lambton engage in a strike contrary to the provisions of section 63(1) of The Labour Relations Act.

12. Having regard to the evidence and representations of the parties, we dismiss the application for consent to the institution of a prosecution against all the respondents except Rudy Sabourin and John Violette for an offence alleged to have been committed under section 67(1) of The Labour Relations Act.

13. Having regard to the evidence and representations of the parties, we are satisfied that arguable points of law and fact exist. In these circumstances, we consent to the institution of a prosecution against the respondents Rudy Sabourin and John Violette for the following offences alleged to have been committed:

That on May 9 and 12, 1975, Rudy Sabourin and John Violette did at Curruna in the Township of Moore in the County of Lambton perform acts which they knew or ought to have known that, as a probable and reasonable consequence of those acts, another person or persons will engage in an unlawful strike contrary to the provisions of section 67(1) of The Labour Relations Act.

14. The appropriate documents will issue.

DECISION OF BOARD MEMBER O. HODGES:

1. I agree with the majority on the question of the jurisdiction of the Board to deal with the application.

2. Before the power to make a business subject to federal jurisdiction becomes operative, the business must have been *declared* by the federal Parliament to be for the general advantage of Canada. Until such a declaration is made, the jurisdiction remains in the Provinces. There is no evidence before the Board that the undertaking in question is a work declared to be for the general advantage of Canada.

3. Considering the question further as to whether the construction is an inter-provincial work or undertaking, it is noted that:

(a) this plant is wholly situated in the province of Ontario, it could only acquire an inter-provincial character by virtue of its connection with the inter-provincial pipeline. However, it is extremely unlikely that this connection is sufficient to transform the plant into an inter-provincial undertaking.

(b) Mere physical connections are not enough. There must be a degree of operative interaction sufficient to consider the two operations as functionally inseparable.

(c) In this instance the plant in question is in my view no more interrelated to the pipeline than a manufacturer of steel is interrelated to the highways and railroads that supply the manufacturing plant with the raw materials needed for its production.

It is my opinion on the facts presented that the construction of this plant itself is not work of an inter-provincial nature.

4. I dissent from the decision of the majority in the exercise of the Board's discretion in this case. The respondents involved have no previous history of illegal work stoppages, nor is there any evidence of a future likelihood of such stoppages. In consequence, no useful purpose would be served by granting the consent to prosecute.

5. My finding is that the application be dismissed.

0713-75-R The Civil Service Association of Ontario (Inc.), (Applicant) v. **The Municipality of Metropolitan Toronto**, (Respondent) v. Canadian Union of Public Employees, Local 43, (intervener).

BEFORE: George W. Adams, Vice-Chairman, and Board Members O. Hodges and J.E.C. Robinson, Q.C.

DECISION OF THE BOARD: October 22, 1975

1. This is an application under section 55 of *The Labour Relations Act*.

2. The application is with respect to the "bargaining rights" of The Civil Service Association of Ontario (Inc.) as a result of a sale of a business by the Crown in Right of Ontario (Ministry of Health) to the Municipality of Metropolitan Toronto alleged to have taken place on or about the 16th day of July 1975.

3. The applicant requests a declaration that the respondent is bound by a collective agreement between the applicant and the Crown in Right of Ontario as it pertains to ambulance drivers, or, alternatively, a determination that all ambulance drivers in the employ of the respondent comprise an appropriate bargaining unit and an order for a representation vote which would permit these employees to choose either the applicant or Canadian Union of Public Employees, Local 43 to be their exclusive bargaining agent.

4. The respondent and the intervener submit that section 55 is not applicable in the circumstances. While numerous arguments were made in support of this general submission, the following three constitute the principle focus of this opinion.

(i) The collective agreement between the applicant and the Crown was entered into pursuant to, and is governed solely by, the provisions of *The Crown Employees Collective Bargaining Act*, 1972 which confers

no powers respecting successor rights arising from such agreements upon either the Ontario Public Service Labour Relations Tribunal or the Ontario Labour Relations Board or any other person or body.

(ii) *The Labour Relations Act* does not apply to, or affect, collective agreements entered into pursuant to the provisions of *The Crown Employees Collective Bargaining Act*, 1972 and such agreements are not collective agreements within the meaning of section 1(e) of *The Labour Relations Act*.

(iii) The Crown is not an "employer" within the meaning of section 55 by virtue of section 11 of *The Interpretations Act*. R.S.O. 1970, c. 225.

5. The facts before the Board are not in dispute. On January 21, 1975 the Minister of Health issued a statement outlining Provincial policy with respect to the unified control of ambulance operations in Metropolitan Toronto. In that statement he specified that Metropolitan Toronto would absorb both the Provincial ambulances and the private operators in the Metropolitan area. This application is only concerned with the former ambulance services.

6. In accord with the statement the Province transferred to the Metropolitan Toronto operation all equipment, vehicles, etc. used by the Province in providing ambulance services in Metropolitan Toronto by York (Toronto) and York (South). And approximately eighty five persons employed with the Ministry of Health in this respect were offered employment by The Municipality of Metropolitan Toronto with effect from July 1, 1975. It would appear that the transfer of the service was approved by Management Board on July 8, 1975 and Cabinet confirmation was granted on July 16, 1975.

7. Prior to this transfer the employees of the Ministry of Health were represented in their employment relations with the Crown by The Civil Service Association of Ontario (Inc.) and covered by a collective agreement between that association and the Crown in Right of Ontario as represented by the Management Board of Cabinet. This collective bargaining relationship was regulated by and subject to the provisions of *The Crown Employees Collective Bargaining Act*, 1972 S.O., c. 67 as amended in 1975 by Bill 179. (Section 5, 6 and 8 of Bill 179 were proclaimed in force on April 17, 1975 and the remainder of the Bill was proclaimed in force on July 21, 1975.)

8. The applicant submits that the transfer of the Provincial ambulance service to Metropolitan Toronto constitutes the sale of a business within the meaning of section 55 of *The Labour Relations Act* and that the section therefore applies. The relevant provisions of that section read:

55. – (1) In this section,

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a part to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while on application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares; the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.

9. No one denies that by reasons of *The Interpretations Act* the Crown is not subject to the provisions of *The Labour Relations Act*. However, the applicant takes the position that the Crown is not affected by the instant application. Section 11 of *The Interpretations Act* reads:

No Act affects the rights of Her Majesty, Her heirs or successors unless it is expressly stated therein that Her Majesty is bound thereby.

10. The respondent and intervener are parties to a collective agreement covering some 4,000 employees of the respondent and Schedules 1 and 2 of that agreement contain a classification entitled "9475 Ambulance Driver/Attendant".

11. The Board has studied the provisions of section 55 and has come to the conclusion that the section has no application in the circumstances. For the section to be operative certain fundamental preliminary conditions must be present and, because of section 11 of *The Interpretations Act*, these conditions do not exist within the unique facts confronting the Board. Accordingly, we must conclude that the section is not designed to effect the transfer of bargaining rights obtained under *The Crown Employees Collective Bargaining Act* to an employer-employee relationship governed by the provisions of *The Labour Relations Act*.

12. Section 55(2) begins with the words "[w]here an employer is bound by or is a party to a collective agreement with a trade union ... sells his business...". Thus, for the section to be operative the facts presented to the Board must meet these initial requirements and they do not in the instant case. By virtue of section 11 of *The Interpretations Act* the Crown is not an employer within the meaning of *The Labour Relations Act* and, *a fortiori*,

because a collective agreement is defined as “an agreement in writing between an employer ... and a trade union”, it cannot be said that the agreement between the applicant and the Crown constitutes a collective agreement for the purposes of *The Labour Relations Act*.

13. The applicant argued that these opening words of section 55(2) were merely introductory in nature and not preliminary requirements; but a thorough analysis of sections 55(2) and (3) clearly suggests otherwise. For example section 55(2) applies where “an employer sells his business while an application for certification ... to which he is a party is before the Board ...”. Clearly, if the applicant was seeking to preserve an application “for representation rights” before the Ontario Public Service Labour Relations Tribunal section 55(2) would have no application. The reference to “Board” in section 55(2) is an obvious reference to the Ontario Labour Relations Board not the Ontario Public Service Labour Relations Tribunal. Moreover, if a successor employer governed by *The Labour Relations Act* was subject to such an application the entire substantive basis to the application would be drastically changed – a result clearly unintended by the draftsmen of both *The Labour Relations Act* and *The Crown Employees Collective Bargaining Act*.

14. Another indication that section 55 has no application in regard to rights and obligations derived from *The Crown Employees Collective Bargaining Act* is found in the wording of section 55(3). Section 55(3) provides that “[w]here an employer on behalf of whose employees a trade union ... has been certified as bargaining agent or has given or is entitled to give under section 13 or 45, sells his business, the trade union ... until the Board otherwise declares, to be the bargaining agent for the employees in the like bargaining unit of that business ...”. This wording demonstrates that the clause has no application to the preservation of “representation rights” granted by the Ontario Public Service Labour Relations Tribunal where no collective agreement is in operation but notice to bargain has been given by the “employer organization” under either section 7 or section 20 of *The Crown Employees Collective Bargaining Act*. The wording of section 55(3) just cannot be stretched that far.

15. In other words, when the entire scheme of section 55 is examined it cannot be said that the initial reference to an employer in section 55(2) is merely introductory in nature and therefore without legal significance. If this were the case only representation rights supported by a collective agreement at the time a business is sold would obtain the protection afforded by section 55 of *The Labour Relations Act*. The improbability associated with this outcome and the inapt language found throughout section 55 supports the conclusion that section 55, in its entirety, has no application to the facts at hand.

16. Finally, as further support for our conclusion, we note that a collective agreement under *The Crown Employees Collective Bargaining Act* is integrally related to specific provisions of that legislation. This is particularly evident from the provisions of section 17 of *The Crown Employees Collective Bargaining Act*, as amended by Bill 179, which reads:

“17. – (1) Every collective agreement shall be deemed to provide that it is the exclusive function of the employer to manage, which function, without limiting the generality of the foregoing, includes the right to determine,

(a) employment, appointment, complement, organization, assignment, discipline, dismissal, suspension, work methods and procedures, kinds and locations of equipment and classification of equipment; and

(b) merit system, training and development, appraisal and superannuation, the governing principles of which are subject to review by the employer with the bargaining agent,

and such matters will not be the subject of collective bargaining nor come within the jurisdiction of a board.

(2) In addition to any other rights of grievance under a collective agreement, an employee claiming,

(a) that his position has been improperly classified;

(b) that he has been appraised contrary to the governing principles and standards; or

(c) that he has been disciplined or dismissed or suspended from his employment without just cause,

may process such matter in accordance with the grievance procedure provided in the collective agreement, and failing final determination under such procedure, the matter may be processed in accordance with the procedure for final determination applicable under section 18."

If this Board were to hold that a respondent employer, subject to the provisions of *The Labour Relations Act*, is bound by a collective agreement negotiated under *The Crown Employees Collective Bargaining Act* the continued application of section 17 of the latter legislation would be unlikely. And in that event the successor employer might be bound by a document without any of the powers found in that section and without any of the more traditional management powers found in private sector agreements. Accordingly, this is but another indication that section 55 of *The Labour Relations Act* has no application to collective agreements or representation rights governed by *The Crown Employees Collective Bargaining Act*.

17. For all of these reasons the application is dismissed.

1015-75-R The United Brotherhood of Carpenters & Joiners of America, Local 494, (Applicant) v. **Dor-Kraft Building Materials Limited**, (Respondent).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

DECISION OF THE BOARD: October 23, 1975.

1. The evidence respecting membership filed by the applicant consists of three dues books which are signed by the persons who purport to be members either of the applicant or of Local 2486 of the United Brotherhood of Carpenters and Joiners of America. The first page of each dues book set forth certain personal information about who has apparently

signed thereon under the general heading of "MEMBERSHIP STATEMENT". This first page indicates that the person whose signature appears thereon was initiated as a member into a named local of the United Brotherhood of Carpenters and Joiners of America on a given date. The initiation fee is indicated. Within this membership statement there appears the printed notation "Current L.U. ...". In two instances "494" has been written therein. However, in the dues book which indicates initiation into the membership of Local 2486 the space in "Current L.U. ..." is left blank. The membership statement in each dues book bears the ink-stamped symbol of the applicant. At the end of the membership statement there appears two lines for the signatures of "President" and "Fin. Sec." Signatures appear in these spaces. However, the pair of signatures which appears on the two dues books which indicate "494" within the space "Current L.U. ..." is not the same as the pair of signatures which appears in the dues book where the space "Current L.U. ..." is left blank. In the latter instance, however, there appears under the signature of the financial secretary the signature of "F. J. Hutnik" (who has signed membership statements of the other two dues books as financial secretary as "Frank J. Hutnik").

2. Within the dues books one page is set aside for each calendar year. The twelve months of the year are set forth and in adjacent columns there appear corresponding spaces for "Amount Paid" and "Date of Payment and Secretary's Signature". Each line commencing in January of 1975 up to and including either August or September of 1975 bears certain numbers and letters which have been ink-stamped such as, for example, "1470 Jul 24'75 F.J. HUTNIK". In some instances the first four numbers have been altered. The page with respect to 1975, which is the first page on which any entries appear, does not bear any initials or signatures and does not unequivocally assert that any money payment on account of dues has been made.

3. The Board is not satisfied that there is an unequivocal evidence of the payment of at least one dollar in respect of initiation fees or monthly dues of the applicant. The Board therefore finds that the dues books which have been filed by the applicant are not evidence of membership as contemplated by section 1(1)(j) of The Labour Relations Act. The Board notes that the applicant consented to the application being disposed of by the Board without a hearing by the Board.

4. In our view, the dues books should *clearly* state the amount paid and should bear the *actual* signature of the person who acknowledges payment on behalf of the applicant.

5. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in any bargaining unit the Board might find appropriate for collective bargaining, at the time the application was made, were members of the applicant on October 3, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. Accordingly, this application is dismissed.

0864-75-R International Brotherhood of Electrical Workers, Local Union 911, (Applicant) v. **Wallaceburg Hydro Electric System**, (Respondent).

BEFORE: D.D. Carter, Vice-Chairman, and Board Members F.W. Murray and P.J. O'Keefe.

APPEARANCES: *W.J. Moore and J.R. Wacheski for the applicant; D.W. Brady and S.M. Duffus for the respondent.*

DECISION OF THE BOARD: October 20, 1975

2. The Board, having regard to the agreement of the parties, finds that all office and clerical employees of the Wallaceburg Hydro Electric System at Wallaceburg, Ontario, save and except the superintendent, the foreman, the office supervisor, persons above the rank of office supervisor, students working during the annual vacation, persons regularly employed for not more than 24 hours per week, and all employees covered by the existing agreement between Wallaceburg Hydro Electric System and Local Union 911, I.B.E.W., constitute a unit of employees of the respondent appropriate for collective bargaining.

3. The membership evidence submitted in this case gave rise to some concern at the hearing. For each of the employees claimed as a member by the applicant, there was submitted to the Board an application for membership signed by the employee and a separate receipt signed by the collector and countersigned by the employee. The cause of concern at the hearing, however, related to the lack of any express reference to the applicant, Local Union 911, on the application form.

4. From its format, it appears that the application form was designed for use by the locals of the International Brotherhood of Electrical Workers. That side of the form containing the employee's signature was labelled, in bold typeface:

**"Local Union Copy
OBLIGATION OF I.B.E.W."**

The obligation itself related not just to the parent union, but was an obligation "to conform to and abide by the Constitution and laws of the I.B.E.W. and its Local Union." The top, right corner of this side of the form, moreover, contained the warning "THIS DUPLICATE TO BE KEPT FOR L.U. FILE." The opposite side of this form provided for information about the employee applicant, and also indicated that the bottom portion was to "be filled in by the L.U. secretary." This side of the form also contained in bold typeface "APPLICATION FOR MEMBERSHIP IN INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS (AFL – CIO and CLC)", a statement which might cause some confusion as to whether the employee was applying for membership in the parent union or its local. The separate receipt, however, was not at all ambiguous, referring specifically to Local Union 911.

5. At issue in this case is whether the evidence submitted by the applicant establishes that the persons claimed to be members have, in fact, joined the applicant, and not just its parent union. If the evidence indicates only membership in the parent union, this evidence by itself will not be regarded by the Board as establishing that the same persons are also members of the applicant local. As the Board stated in *Milsom Floors Ltd.*, [1966]

O.L.R.B. 419, and has reiterated on numerous occasions, “[w]hile this Board has held evidence of membership in a local union is evidence of membership in the parent union of the particular local it has never held that evidence of membership in the parent is *per se* evidence of membership in a particular local”. Behind this approach is the problem of identification. Although it is simple enough to identify the parent union through its local, it is quite a different matter to identify the local through its parent. A parent union may have many locals, and in some cases these locals may actually compete against each other. This means that the fact that an employee has joined the parent union does not necessarily point to that person’s membership in the particular local of the parent that seeks to acquire bargaining rights under the Act. The Board, therefore, cannot rely on this type of evidence when determining the extent of the applicant’s support among the employees in the bargaining unit.

6. The question of whether the membership evidence in this case relates sufficiently to the applicant, although primarily one of fact, does require some examination of the decisions of the Board in previous cases. A perusal of the Board’s jurisprudence, however, does not reveal any cases whose facts exactly parallel the facts of this case. In this case, the application form is ambiguous, referring to both the parent union and a local, but, on the other hand, the separate receipt contains an unambiguous reference to a particular local. In *Beaver Foundation Ltd.*, [1967], O.L.R.B. 652, where the combination application and receipt contained no reference to the applicant local union, the Board held that the membership evidence in that case did not relate sufficiently to the local. In a later case, *Envoy-McLean Ltd.*, [1969] O.L.R.B. 1424, only receipts were filed as evidence of membership, and these receipts were not free of ambiguity, referring to the applicant local but also authorizing the parent to represent the employee in collective bargaining. The reasons for dismissing the application were that the applicant had filed only receipts, and that these receipts did not show that the persons whose names appeared on them had “applied for membership in the applicant or agreed to accept the obligation of membership or were duly enrolled as members”. The final case is *LeDroit Ltee.*, [1970] O.L.R.B. 945, in which the local union was not identified on the application form (although a space was provided for it on the form) nor was it identified on the receipt forms (which also lacked counter-signatures), and where the separate membership obligation was ambiguous, referring to both the local and its parent. In these circumstances, the Board rejected the membership evidence submitted by the applicant local union.

7. These cases indicate that an ambiguous reference on a receipt form is one factor that leads the Board to reject membership evidence. The converse proposition, however, is left unanswered. Can it be said that an unambiguous reference to the applicant on the receipt form is sufficient to cure any other ambiguity in the membership evidence? In our view, this question cannot be answered categorically, but can only be answered after careful examination of the facts in each individual case. The most that can be said is that an apparent ambiguity in membership evidence will not be fatal, provided that the membership evidence, as a whole, points unequivocally to membership in the applicant.

8. Examining the facts in this case, we conclude that the membership evidence does relate sufficiently to the applicant, Local Union 911. There is no doubt in this case that the employees in question were applying for membership in some organization, a fact distinguishing it from *Envoy-McLean Ltd.*, *supra*, where there was uncertainty as to whether the employees had accepted any obligation of membership. Even more important is the fact

that one important component of the membership evidence, the receipt forms, refer clearly and unambiguously to the applicant. In contrast, no component of the membership evidence submitted in *Beaver Foundation Ltd.*, *supra*, *Envoy-McLean Ltd.*, *supra*, and *LeDroit Ltee.*, *supra*, was free from ambiguity. A final factor in this case is that the receipts bear exactly the same date as the application forms, the common date being evidence of the connection between the application forms and the receipt forms. In our opinion, therefore, the apparent ambiguity created by the application forms has been extinguished by the clear reference to the applicant on the related receipt forms. Accordingly, we conclude that the membership evidence submitted establishes that the employees in question have joined the applicant.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five percent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 12, 1975, the terminal date given for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. A Certificate will be issued to the applicant.

0668-75-R Association of Professional Student Services Personnel, (Applicant) v. The Board of Education for the Borough of East York, (Respondent).

BEFORE: D.D. Carter, Vice-Chairman, and Board Members F. W. Murray and P.J. O'Keefe.

APPEARANCES: *M. Gordon and S. Caffrey for the applicant; B.R. Baldwin for the respondent*

DECISION OF VICE-CHAIRMAN D.D. CARTER AND BOARD MEMBER P.J. O'KEEFE: October 21, 1975.

2. The Board, having regard to the agreement of the parties, finds that all psychologists, assistants to psychologists, and attendance counsellors employed by the respondent in the Borough of East York, save and except Senior Psychologists and persons above the rank of Senior Psychologist and persons regularly employed for not more than 24 hours per week constitute a unit of employees of the respondent appropriate for collective bargaining. For the purpose of clarity, the Board notes that psycho-educational consultants fall within the classification assistants to psychologists.

3. The membership evidence submitted by the applicant took the form of an application for membership and a receipt combined on a single sheet of paper. This combination application and receipt contained the following wording:

THE ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL
APPLICATION FOR MEMBERSHIP Dated 19

Surname: _____ Given names: _____

Address: _____

Profession: _____ phone numbers: # _____ (office)

City or town: _____ # _____ (home)

Employer: _____

Address: _____

I hereby make application to become a member of the Association of Professional Student Services Personnel. In doing so, I of my own free will and accord hereby authorize the Association of Professional Student Services Personnel or its representatives, or officers, to act for me as Collective Bargaining Agent in negotiating the relationship in all matters pertaining to rates of wages, hours of work and all other terms and conditions of my employment with my employer.

Signature: _____

Initiation Fee: _____

Signature Witnessed
and Fee collected by: _____
(collector)

DO NOT DETACH

ASSOCIATION OF PROFESSIONAL STUDENT SERVICES PERSONNEL

Receipt as acknowledgement of the sum of \$1.00 from

_____ on account of
(name)

initiation fees and dues in the abovementioned Association,
this _____ day of _____ A.D. 1975.

(Treasurer)

4. What is of concern to the Board in this case is that each piece of membership evidence contained only a single signature of the applicant for membership. There is a serious question as to whether membership evidence in this form meets the requirements that have been laid down by the Board in its previous decisions. These decisions indicate that, as a general rule, the Board requires the applicant for membership not only to sign the application form, but also to countersign the receipt in order to corroborate the payment of the required initiation fee. The reasons for the general requirement of a countersignature are set out in *Mercury Terrazzo Ltd.*, [1970] O.L.R.B. 291, at p. 293:

The Board, of necessity, has to rely heavily on the documentary evidence of membership submitted in support of an application for certification. For that reason, although the Board has not made it absolutely mandatory, it is highly desirable, and the Board requests that receipts submitted indicating the payment of initiation fees be signed not only by the collectors but also countersigned by the applicants for membership. This precaution provides more adequate protection for both the Board and the applicant trade union which is relying on the documentary evidence. Where there is any doubt on the part of the Board as to the propriety of the procedures followed by an applicant trade union in the securing of the evidence of membership upon which it relies, the absence of countersignatures on the receipts for initiation fees must weigh heavily against the applicant.

5. The general requirement of a countersignature, therefore, does not mean that membership evidence not meeting this requirement will be inherently defective. The absence of the countersignature, however, does have the effect of weakening the membership evidence. As a result, the Board must look more closely at the circumstances surrounding the membership evidence to determine whether it is a sufficiently cogent expression of the wishes of the employees. Consequently, a union which submits membership evidence not corroborated by a countersignature of the employee applying for membership evidence runs a serious risk of not establishing the reliability of that evidence to the satisfaction of the Board.

6. In this case, we have come to the conclusion, although not without some reluctance, that, in these particular circumstances, the membership evidence is sufficiently cogent to justify certification without a vote. The facts of this case are remarkably similar to those of *Mercury Terazzo, supra*. The evidence of membership took the form of combination applications and receipts, the signatures of the applicants for membership appeared on the application portion of the form, and no attempt was made to pass-off the receipts as being countersigned. In addition to these factors, there is the further consideration that, on the application portion of the form, the applicant for membership appears to have written in the amount of the initiation fee under his or her signature. Although this method of acknowledging payment of the initiation fee is far less satisfactory than the usual countersignature, nevertheless it is some corroboration of the fact that the initiation fee was paid.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 10, 1975, the terminal date given for this application and the date which the Board determines under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. A certificate will be issued to the applicant.

“D.D. Carter”
for the majority

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.
2. I would not have found that the membership evidence is sufficiently cogent to justify certification without the taking of a representation vote.
3. On examination of the evidence I found that on the applications for membership the amount of the "initiation fee" is written under the applicant's signature and in some cases there is no doubt that the amount is written by the same person who signed the application form. In other cases, I could not be sure who entered the figure or when it was entered. I could not be satisfied with this method of acknowledging payment of the initiation fee allegedly by the Applicant, and accordingly I would have ordered that a representation vote be conducted.

0834-75-R Mississauga Public Library Staff Association, (Applicant) v. City of Mississauga Public Library Board, (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members E. Boyer and J.E.C. Robinson, Q.C.

APPEARANCES: *P. A. Broadhurst, Mary-Ethel Bradley, T. B. Verity, G. E. Scheel, W. H. Edwards, R. Kennedy, B. Kho, J. Samaras, D. Hall, J. Bedford, A. Wortley and L. Swain for the applicant; A. P. Tarasuk and N. Ryan for the respondent.*

DECISION OF THE BOARD: October 16, 1975

2. This is an application for certification in which the applicant was required to prove its status as a trade union.
3. A trade union is defined under section 1(1)(n) of *The Labour Relations Act* as follows:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions.

4. The evidence is that an organization known as Mississauga Public Library Staff Association had been in existence for some years prior to 1970. A constitution for an association so named was filed with the Board. This constitution indicates, on its face, that it had been previously amended on October 31, 1970, September 27, 1970, and that it was further amended on October 15, 1973.

5. The objectives of the Association set out in the above constitution are to promote library service by encouraging co-operative effort among all members of the staff and to effect ongoing communication with the Library Board.

6. The membership was open to all employees except the chief librarian.
7. It is clear from a reading of the foregoing constitution that the Association was not a trade union within the meaning of the definition set out above.
8. On August 29, 1975; the present application was filed. Subsequent to that date, namely on September 5, 1975, the annual meeting of the Mississauga Public Library Staff Association was held. At that meeting the constitution was amended.
9. The amended constitution provides that the organization shall be known as the Mississauga Public Library Staff Association which, of course, is the title under which the organization was carried on prior to the September amendments.
10. The objectives set out in the amended constitution are as follows:
 - “1. To promote library service by encouraging co-operative effort among all members of the staff.
 2. To effect ongoing communication with the Library Board.
 3. To promote and undertake action on issues relevant to members of the Association, including the status and well being of members of the Association involved in all aspects of library service, and to sustain and coordinate the activities of its members.
 4. To represent members of the Association as entitled by law for the purpose of dealing with any duly appointed representatives of the Library Board, with the objective of establishing a Collective Agreement covering all terms and conditions affecting the employment status of the members of the Association.”
11. The amended constitution provides for membership for all persons employed by the Mississauga Public Library Board, except that no person is to be admitted nor permitted to continue to maintain membership who is or would be excluded from the bargaining unit by the Ontario Labour Relations Act or other relevant legislation.
12. At the same meeting of September 5, 1975, and after the amended constitution had been adopted by the members present, a motion was passed unanimously that all persons applying for membership in the Staff Association be accepted and confirmed as members of the Association.
13. The applications for membership, which were filed as evidence of membership by the applicant, were all dated prior to September 5, 1975, that is prior to the date upon which the constitution was amended. The applications were for membership in Mississauga Public Library Staff Association at which time, of course, the organization was still operating under the old constitution. It is obvious that the motion referred to above was intended to reaffirm and confirm the membership of those present in the new organization.
14. Having confirmed the membership of those present, the meeting then unanimously ratified the by-laws and constitution of the Association. A further motion was then

passed unanimously confirming and ratifying the election of officers which had been held at the commencement of the meeting of September 5, 1975.

15. Notwithstanding the foregoing efforts to reorganize and clothe the Association with the attributes of a trade union, the fact remains that even if the Board were to find that the applicant was a trade union within the meaning of the Act at the date of the hearing of this matter on September 15, 1975, difficulties still would face the applicant.

16. A fundamental difficulty is that at the time the application was made the Association was operating under the 1971 constitution and not under the September 5, 1975 constitution. On the date the application was made, that is August 29, 1975, the Association was not a trade union within the meaning of the Act. The amendments made on September 5, 1975 were obviously directed at curing that defect. Counsel for the applicant did not argue that the Association had been a trade union at the date the application was made but, rather, submitted that it was open to it to cure any defects in status by a constitutional amendment at any time up to the date of hearing. In support of his position, counsel for the applicant stated that he was relying upon the following statement and the cases cited in support thereof found in "Ontario Labour Relations Board Practice," Sack and Levinson, at page 51: "The onus is on the applicant to prove its status, which, if the certification application is to be successful, must be perfected by the application or hearing date, and cannot be cured by actions subsequent thereto."

17. The Board is unable to accept the argument advanced by the applicant. Section 5 of the Act deals with the establishment of bargaining rights through certification. In the various situations set out in the subsections to section 5, it is plain that an application for certification is to be made by a trade union. It follows that in order to comply with the Act an applicant must be a trade union at the time the application was made and the Board has consistently so held.

18. The quotation set above, in the opinion of the Board, fails to make clear that there are two principles involving proof of status dealt with by the cases cited. One principle involves the date by which the applicant must qualify as a trade union while the other principle involves the date by which proof of this qualification must be presented to the Board.

19. The first principle that emerges from the cases cited is that an applicant must satisfy the requirements of trade union status as of the date of the application. Amendments to the applicant's constitution made after the date of the application, even if carried out before the date of hearing, are irrelevant (*Buckley Cartage Ltd.*, (1964) O.L.R.B. Rep. (Jan.) 593; *Versafood Services Ltd.*, (1967) O.L.R.B. Rep. (Sept.) 539; *Island Park Foodmart Ltd.*, (1970) O.L.R.B. Rep. (Nov.) 838).

20. The second principle found in the cases is that an applicant must prove that it has satisfied the requirements for status (and that it did so by the date of application) at the hearing. Evidence submitted after the hearing (i.e. by letter) will be considered irrelevant, unless the Board specifically granted leave at the hearing to submit the evidence at a later date (*Playtex Ltd.*, (1959) O.L.R.B. Rep. (Dec.) 316; *Buckley Cartage Ltd.*, (1964) O.L.R.B. Rep. (Jan.) 593; *Underwater Gas Developers Ltd.*, (1967) O.L.R.B. Rep. (Sept.) 555; *Hamilton & District School of Nursing*, (1968) O.L.R.B. Rep. (Jan.) 960).

21. In view of the provisions of section 5, and having in mind the correct statement of the principles set out above, the Board finds that the applicant was not a trade union within the meaning of the Act at the date that the application was made and that the subsequent action taken does not meet the prerequisite to a successful application.

22. The Board would further point out to the applicant that the membership evidence filed with the Board does not in any way distinguish the applications for membership made by the persons who reconfirmed their applications at the meeting of September 5 from those who applied for membership during the time prior to September 5 when the previous constitution was in force; so that even if the steps taken at the September meeting were sufficient to constitute the Association as a trade union at that date, it does not cure the defect in the membership applications of those persons who were not in attendance at that meeting.

23. In the result, the application must be and is hereby dismissed.

0461-75-U Jim Zorzi, Brian Nadaline, and other employees of Zehr's Markets Limited as listed on Schedule "a", (Complainants) v. **Diamond "Z" Association**, (Respondent).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members F. W. Murray and H. Simon.

APPEARANCES: *J. A. Ryder for the complainants, M. J. Villemaire Q.C. and T. Dale for the respondent.*

DECISION OF THE BOARD: October 6, 1975.

1. This is a complaint filed under section 79 of the Act where it is alleged that the grievors were treated by the respondent trade union contrary to its duty of fair representation.

2. The respondent trade union was certified on March 14, 1974 for a bargaining unit of employees of Zehr's Markets Limited (hereinafter referred to as "the employer") at its five retail stores in Guelph, Ontario. At all material times the grievors named herein were employees of Zehr's Markets Limited and were members of the bargaining unit defined in the Board's certificate.

3. The background circumstances surrounding the complaint pertain to the conduct of the respondent's officials in representing the interests of employees in negotiating a first agreement with the employer. After certification a meeting of employees was arranged on March 30th at the Knights of Columbus Hall in Guelph. Members holding executive office were in attendance at the meeting and Mr. Ted Dale, President, acted as spokesman. At the meeting it was decided that the more favourable provisions of subsisting collective agreements with the employer should be applied to form the basis of the respondent's proposals for a first agreement. Incidental to the issue of a wage increase Mr. Dale indicated that two particular items would also be included in the proposals. That is to say, the negotiated set-

tlement would be made retroactive to the date of certification and that the expiry date of the concluded collective agreement would be made to coincide with the expiry on September 30, 1975 of a subsisting "warehouse agreement" between the respondent and the employer. The strategy underlying the coincidental expiry dates was planned with a view to buttressing the respondent's bargaining power upon negotiation of a second collective agreement.

4. The evidence indicates that negotiations between the respondent and the employer were protracted. On September 24, 1974 a second meeting of employees was arranged. Members of the respondent's executive who were appointees on the negotiating committee were in attendance. A proposed settlement was submitted to the employees for their opinion. Again the retroactivity of wage increases and the agreement's duration were treated as a *fait accompli*. Indeed, Mr. Dale assured the employees by indicating that he possessed a letter from the employer committing it to the retroactive provision. The meeting terminated with the direction that the executive committee renegotiate the salary schedules of a number of classifications of employees.

5. On December 4, 1974, a ratification meeting was arranged. It appears that because of inadequate notice of the meeting and the inclement weather conditions a poor turn out resulted. Out of a bargaining unit of approximately 250 employees only thirty attended. Executive members on the negotiating committee were also in attendance. A discussion with respect to whether the meeting ought to proceed ensued amongst those in attendance. The opinion of the meeting was that the ratification vote ought to be held in light of the protracted nature that the negotiations had assumed. Mr. Dale indicated that the settlement was not a good one but it was a sufficient "door opener" having regard to the difficulties of negotiating a first agreement. Again the retroactivity of the wage increase was confirmed upon the questioning of Mr. Gary Ryder, an employee in the bargaining unit, by reference to the letter in Mr. Dale's possession committing the employer to that provision. Four draft collective agreements were circulated amongst the employees for their perusal prior to the holding of the ratification vote. The schedules pertaining to the wage settlement were indicated in separate categories headed "1974" and "1975" respectively. The spaces provided for the duration clause were not filled in. Upon bringing this shortcoming to his attention Mr. Dale assured the employees that the spaces would be filled in at the time of signing the formal document. Again Mr. Dale assured the employees that the collective agreement would expire on September 30, 1975 to coincide with the expiry of the "warehouse agreement". As a result of these assurances a number of employees decided to cast their ballots in favour of the proposed settlement. The results of the ratification vote recommended by the narrow margin of two ballots acceptance of the settlement put to the employees by the negotiating committee.

6. Afterwards a controversy arose amongst employee members of the bargaining unit. Because of the relatively poor turn out of employees and the challenged participation of a number of employees in the ratification vote, a second ratification meeting was scheduled for February, 1975. That meeting was attended by members of the executive committee. The turn out of employees was so poor that Mr. Dale resolved to dispense with the holding of another ratification vote. He merely explained the terms of the settlement ratified at the December meeting and repeated particularly that the wage increase committal was again referred to. At that meeting Mrs. Norma Fischer, a member of the bargaining unit, wanted to know the terms of the wage settlement. Mr. Dale then showed her a draft copy of the collective agreement approved by the employees at the ratification meeting. Mrs.

Fischer immediately turned to the wage schedules and noted the amounts under the appropriate headings "1974" and "1975" respectively. Mrs. Fischer confirmed that the spaces in the duration clause were left blank but was assured by Mr. Dale that the agreement would run out in September, 1975. The meeting terminated after Mr. Dale indicated that the settlement would constitute the terms of a collective agreement to be signed the next day.

7. Shortly thereafter the grievors discovered to their dismay that the terms of the collective agreement entered into between the respondent and the employer in many respects differed from the terms of settlement approved at the ratification meeting and confirmed at the meeting in February, 1975. A comparison of the two documents marked as exhibits herein establish thirteen discrepancies between the terms of settlement. Without detailing these discrepancies, special emphasis ought to be placed on the terms relating to the retroactivity of the salary increases and the incidental issue affecting salaries relating to the agreement's duration. In this regard the termination clause reads as follows:

"This Agreement shall become effective on the 12th day of January, 1975 and shall continue in effect until January 1, 1977. It shall be renewed automatically from year to year unless either party gives to the other party, within a period of not more than ninety (90) days before the expiry date, notice of termination or amendment.

For The Diamond "Z" Association

"Theodor Dale"

"Mervyn Robert Coulter"

For The Company Zehr's Markets Limited

"Carl M. Zinkman"

"Verne Burnett"

"John Holbrooke"

Provisions dealing with the retroactivity of wages to the date of certification and the anticipated expiry date of September 30, 1975 are conspicuously absent. And in this connection the salary increases anticipated by the employees for the years "1974" and "1975" were altered accordingly to read "1975" and "1976" respectively. In other words the anticipated salary increases were deferred one year in accordance with the term of operation of the consummated agreement. As a result of these revelations the grievors decided to initiate these proceedings alleging a violation of the respondent's duty of fair representation. (See Board File No. 0027-75-U). Upon seeking the advice of counsel that complaint was withdrawn and followed by the filing of a fresh complaint.

8. Mr. Dale's answer to the grievors' allegations was that a gross misunderstanding had arisen between the negotiating committee and the employees. He explained that initially it was the respondent's intention to negotiate retroactive increases of salaries and a short duration clause to coincide with the expiry of the "warehouse agreement". He stated, however, that because the negotiation proceedings became so protracted these aims could not be achieved especially having regard to the employer's insistence on a two year term of operation. The settlement presented to the employees at the ratification meeting for their approval was intended to be a two year agreement effective from the date of signing. Upon presentation of the draft agreement in January, 1975, the employer typed a formal docu-

ment consistent with this understanding. Mr. Dale further explained that no retroactive salary increases were contemplated. He indicated that all employees in the employ of Zehr's were granted quarterly "cost of living" increases that ran concurrently with the negotiations. The letter that was referred to in his address to employees at the various meetings was the letter showing the respondent's concurrence with these increases in light of the "freeze" on wages imposed during the period of negotiation under section 70(1) of *The Labour Relations Act*. Indeed, four letters were filed in evidence indicating the respondent's concurrence with the alteration in employees' wages. Aside from Mr. Dale's testimony no additional evidence was adduced through other members of the negotiating committee who represented members of the negotiating committee who represented the employees at the seven negotiating meetings with the employer and who attended at various times the meetings of employees. On January 12, 1975 the collective agreement marked Exhibit #2 to these proceedings was signed by the representatives of the respondent trade union and the employer as indicated in paragraph 7.

9. The single issue confronting the Board is whether the respondent through its officers violated its duty of fair representation in making a collective agreement with the employer that purportedly was a significant departure from the terms of settlement approved by employees in the bargaining unit described in the Board certificate referred to in paragraph 2 herein. Because of the relative uniqueness of the Board's requirement to assess a trade union's conduct during the course of the negotiation of a collective agreement, we propose at this point to review the standard of conduct expected of trade union representatives within the realm of our past cases.

10. The Board's experience in dealing with complaints alleging breach of a trade union's duty of fair representation has been restricted mainly to grievance disputes involving individual claims for relief under the remedial provisions of a collective agreement. The Board's task in these cases has been to apply the standard contemplated by the phrase "a trade union ... shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any employees in the unit ..." to the treatment conferred the grievor in regard to the disposition of his claim. In reviewing the trade union's conduct the Board has been cautious not to impinge upon the discretion of union representatives to negotiate a settlement of the employee's complaint nor to impose a standard in the exercise of that discretion that does not conform to the realities of the particular situation. The Board is not oblivious to the pragmatic considerations that are weighed by union representatives couched with the authority to resolve these disputes. Achieving an equitable solution often requires the balancing of the relative merits of the individual's complaint with the obligations owed the majority of employees. Indeed, the trade union is not required to capitulate to the insistence of a grievor to process his complaint to ultimate review by a Board of Arbitration. In addressing itself to this factor, the Board is cognizant that the trade union must concern itself with a continuing and viable collective bargaining relationship with the employer that may very well be undermined by the indiscriminate processing of grievances. (See; *The Ford Motor Company Ltd.* case OLRB M.R. October 1973 519 at p.526-527; *The Essex International Canada Ltd.* case OLRB M.R. January 1972 104).

11. The Board in measuring the standard imposed by the duty of fair representation has also been careful to distinguish mere inadequacy in the representation of employees in a bargaining unit from bad faith representation. In dealing with these complaints the Board has excused a respondent trade union from allegations of wrongdoing where it was shown

that the grievor was the unfortunate victim of shortcomings that may have included his representative's poor judgement, irresponsibility and unawareness. (See: *The Mohamed Salah Guindehi* case OLRB M.R. April 1973 184 and upheld on review by the Divisional Court by its decision dated September 27, 1973, per Monrand, J.) In these situations the Board has been of the view that the Legislature did not intend by the introduction of the standard of the duty of fair representation to protect the grievor from this category of human shortcoming. (See; for example *The Canadian Rogers Eastern Ltd.* case OLRB M.R. May 1975 406 at p.413). Nevertheless the Board's rulings relieving a respondent trade union on these grounds is intended to be without prejudice to recourse by the grievor to other remedies that may be available under the trade union's constitution, the termination provisions of *The Labour Relations Act* or the common law. When the trade union's duty of fair representation is viewed from this perspective the Board has refrained from violating its own admonition of imposing a standard of conduct, having regard to the circumstances, that may be too impractical for the trade union to satisfy. (See; *The Rutherford Dairies Ltd.* case OLRB M.R. March 1972 240; *The Dorothy Ellens* case OLRB M.R. August 1972 770).

12. What then constitutes a breach of the trade union's duty of fair representation? We have concluded that a breach of the duty most often comprehends conduct that is so wanton that the most modest of employee expectations to the benefits of collective bargaining have been betrayed by his trade union. (See; *The Canadian Union of Public Employees Local 1000* and *Ontario Hydro Employees Union* OLRB M.R. May 1975 444 at pp.450 to 464 for a review of the authorities.) In defining the type of misconduct contemplated by the Legislature the Board requires that a trade union not act "arbitrarily" in the sense that it fails to address itself to the particulars of an employee complaint and thereby disposes of it without regard to its merits. In short, a union is constrained from treating employee complaints in a capricious or perfunctory manner. A trade union must not act "discriminatorily" in that the benefits of representation are conferred one member of the bargaining unit and denied another without reasonable excuse. Like situations ought to be treated in a like manner and without favour to any one individual. And finally a trade union must act in good faith and without malice or hostility to the complainant. An employee is entitled to be represented by his trade union with candour and with honesty in connection with the disposition of his concerns. A trade union that declines upon proof thereof to satisfy these simple employee expectations will be liable to pay the penalties contemplated by the remedial provision of *The Labour Relations Act*. (See: *The Alfred Compton* case OLRB M.R. October 1972 917; *El Mocambo* case OLRB M.R. October 1972 862; *The Joseph Pap* case OLRB M.R. January 1974 60).

13. The situation presently before the Board is unique in that the complaint pertains to a trade union's conduct after certification in negotiating its first collective agreement. There is no dispute that the duty of fair representation owed employees in a bargaining unit is just as relevant during the negotiation of a collective agreement as during its term of operation once concluded. It is also without dispute that the pivotal period anticipated in the collective bargaining process is the conclusion by the parties of a collective agreement. The supervisory jurisdiction of the Board as expressed in the Act in connection with the conduct of both union and employer during negotiations is restricted to the requirement that the parties "shall bargain in good faith and make every reasonable effort to make a collective agreement." Save for this mandatory requirement the Board in applying a standard owing employees in the bargaining unit during the negotiating process is conscious that it must not interfere with the wide discretion conferred the employees' "exclusive bargaining agent" to

reach a settlement. The Board is cognizant, especially during the negotiation of a first agreement, that the period preceding the making of a collective agreement is often when employees' hopes for improved terms and conditions of employment are at their height. Indeed the trade union may have induced these expectations by representations made during the course of an organizational campaign or at the twilight of an agreement about to expire. The realities of the negotiating process however may often result in some measure of employee disappointment with respect to the ultimate settlement. The synthesis contemplated in the bargaining process where the initial positions of the parties are subjected "to the give and take" of compromise and concession is bound to cause some measure of alteration in those positions. In this context the trade union representative must be at his most adroit. He must convince the rank and file that the sacrifice of long term benefits for immediate gains is desirable having regard to the particular circumstances. The employees must be convinced that the benefits not included in a settlement are merely deferred benefits until the onset of the next bargaining session. In the same context the employer's strategy of containing the more excessive demands of the trade union may have resulted in the avoidance of a work stoppage by virtue of acceding to the minimal requirements that constitute in the circumstances a fair settlement. Achieving this mutual accommodation requires the unfettered discretion of the representatives of the parties to explore all avenues of accommodation without the intervention of this Board in setting standards of conduct that may be characterized as an unwarranted intrusion in their private affairs. We are of the view that the representative trade union despite its obligation to employees in complying with the duty of fair representation must necessarily have "a free hand" in setting strategies that will best forward employees' interests irrespective of their expectations. (See; *The Nicholas E. Erdely* case OLRB M.R. September 1972 844).

14. What then ought to be the minimum expectation of employees with respect to their union's compliance with the duty of fair representation during the negotiating process? We do not intend by raising this question to prescribe a standard of conduct that could be construed to interfere with the internal procedures of trade union. A Union may have adopted its own procedures, whether governed by regulations contained in its constitution or by past practice, for communicating business matters to its constituents. Some trade unions as a matter of general practice will seek the approval of the rank and file prior to concluding a formal collective agreement; whereas, other unions may be authorized by their principals to enter into an agreement without prior consultation. Of those trade unions that do refer tentative settlements to the rank and file some may require the recommendation of their representatives; others may not. In other words the practice that is adopted by a trade union in negotiating process is not intended to be assessed in determining whether a breach of the duty of fair representation has occurred. Matters pertaining to that issue ought to be resolved privately by the parties having regard to their particular needs. (See; *The Arthur Joseph Roberts* case OLRB M.R. March 1974 169 at p.172; *The General Impact Extrusions* case OLRB M.R. August 1972 798; *The Canadian Textile and Chemical* case OLRB M.R. August 1971 469 at p.470 for Board expression of its concern in interfering in internal union affairs). What the Board is concerned about in measuring the conduct of union representatives during the negotiating process is whether the employees affected have been treated honestly and in good faith. The adequacy of the settlement and the formal processes adopted in order to arrive at an accommodation are not necessarily in issue. What is in issue is whether the trade union by its conduct has acted fairly in the interest of employees in dealing with the employer with respect to their terms and conditions of employment. Because of the relative uniqueness of the problems raised in the instant case, the Board has investigated the

guidelines set by American jurisprudence in determining the standard anticipated by the Legislature in introducing the doctrine of the duty of fair representation. Thus in *Ford Motor Co. v. Huffman* [1953] 345 US 330, 23 LC p.67,505, the Supreme Court stated at p.338:

"The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents ... Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, *subject always to complete good faith and honesty of purpose in the exercise of its discretion.*"

15. The question to be resolved therefore is whether the Board is satisfied that the respondent trade union through its officers has exercised "complete good faith and honesty of purpose" on the grievors' behalf in concluding a collective agreement with the employer. In dealing with the evidence the Board at the outset wishes to emphasize that the testimony adduced through the five witnesses called by counsel for the grievors was given in total candour and consistency. Notwithstanding counsel's cross-examination we have no reason to doubt the authenticity of their version of the events described during the course of the meetings attended by them where matters pertaining to the tentative terms of settlement were discussed. On the other hand, the version of events as adduced through the evidence of Mr. Dale, the respondent's president, was so plagued with inconsistency that we cannot attach a modicum of credibility to his story.

16. In the first instance, the Board does not accept Mr. Dale's theory that a gross misunderstanding occurred between the union's negotiating committee and the rank and file. For example, the alleged letter committing the employer to retroactive increases was consistently referred to by him at the various employee meetings. He never referred "to letters" in the plural to signify the reception of four letters requiring his signature in compliance with the provisions of section 70(1) of the Act. We are of the opinion that these letters were not intended to be nor were they of any relevance to the negotiation of the retroactive increases. In another context, we find that Mr. Dale's representation to the employees that the collective agreement would expire in October, 1975 was untrue. In this regard, the Board does not find it uncommon in collective bargaining for concluded agreements having regard to the protracted nature of negotiations to be effective from a period that predates the actual execution of the formal document. If Mr. Dale's version be accepted that the employer insisted upon a collective agreement of two years duration *from the date of signing*, then he ought to have advised the employees of the change prior to executing an agreement having regard to the specific undertakings made to them. In this regard, we note that the matter of the unfilled blanks on the duration clause was particularly brought to Mr. Dale's attention at the ratification meeting. Furthermore no attempt was made by Mr. Dale, who was the sole representative on the negotiating committee to be called to answer the allegations, to explain the balance of the thirteen discrepancies between the approved terms of settlement and the concluded agreement. Indeed, the Board became very concerned when one witness expressed the view that "they were better off without the respondent than with it having regard to the contract."

17. The Board is satisfied that the employees represented by the respondent were victims of their union's misrepresentation. Mr. Dale during the course of his testimony admitted to signing along with Mr. Coulter the collective agreement on January 12, 1975. He indicated this to be the case in the context of "the misunderstanding" pertaining to the retroactive salary increases. That is to say, the collective agreement was intended to be effective from the date of execution and not from March 14, 1974. Yet, notwithstanding the conclusion of the collective agreement in January, he acceded to the request of the employees to arrange a second ratification meeting for February, 1975. At that meeting employees in attendance were assured that the formal agreement to be signed the next day would contain the terms of settlement approved by employees at the first ratification meeting in December, 1974. Indeed, Mrs. Fischer was given a draft copy of the collective agreement upon requesting information about her own salary increases. At that meeting the same representation with respect to the retroactivity provision and the duration clause of the new agreement was repeated. In light of this flagrant abuse of authority the Board is constrained to the conclusion that at all material times the respondent simply has not exercised "complete good faith and honesty of purpose" on the grievors' behalf. The Board therefore finds that the respondent has violated its duty of fair representation as expressed by section 60 of *The Labour Relations Act*. (See; *Larson v. All American Transport Inc.* (1969) 59 LC p.13,214).

18. The Board therefore directs that the parties meet in accordance with the undertakings made by counsel at the hearing dated September 16, 1975 and make some effort to reach an equitable arrangement with respect to compensation in this matter. The Board, in absence of an agreement, will remain seized of the issue.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1975

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0518-75: United Steelworkers of America (Applicant) v. The Kendall Company (Canada) Limited (Respondent) v. International Union of Operating Engineers Local 796 (Intervener) v. Group of Employees (Objectors).

Unit #3: "all employees of the respondent at its Curity Avenue location, Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, laboratory technicians, industrial engineers, industrial technologists, maintenance engineers, project engineers, project technologists, persons regularly employed for not more than 24 hours per week, students employed during the school vacation periods and all those persons covered by subsisting collective agreements." (416 employees in the unit).

Unit #3: "all employees of the respondent at its Howden Road warehouse location, Toronto, Ontario, save and except foremen and those persons above the rank of foreman, office and sales staff." (15 employees in the unit).

(Bargaining Unit #2 – See Certification Dismissed Subsequent to Post-Hearing Vote).

(Bargaining Unit #4 – See Application For Certification Dismissed – No Vote Conducted).

0663-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Duplate Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all clerical, office and technical employees of Duplate Canada Limited, Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, private secretary to the plant manager, secretary to the industrial relations manager, secretary to the material control manager and students employed during the school vacation." (21 employees in the unit). (Having regard to the Board's practice and the submissions of the parties).

0668-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of East York (Respondent).

Unit: "all psychologists, assistants to psychologists, and attendance counsellors employed by the respondent in the Borough of East York, save and except Senior Psychologists and persons above the rank of Senior Psychologist and persons regularly employed for not more than 24 hours per week." (4 employees in the unit). (Having regard to the agreement of the parties). (For the purpose of clarity, the Board noted that psycho-educational consultants fall within the classification assistants to psychologists.).

0672-75-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of Etobicoke (Respondent).

Unit: "all psychologists, assistants to psychologists, social workers and attendance counsellors employed in the Student and Special Services Branch of the Board of Education for the Borough of Etobicoke in the Borough of Etobicoke save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons regularly employed for not more than 24 hours per week." (14 employees in the unit). (Having regard to the agreement of the parties).

0717-75-R: Canadian Union of Public Employees (Applicant) v. Royal Ottawa Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all graduate child care workers employed by the respondent at Ottawa, save and except supervisors and persons above the rank of supervisor." (45 employees in the unit). (Having regard to the agreement of the parties).

0748-75-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Baycrest Hospital and Jewish Home for the Aged (Respondent).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, professional medical staff, payroll officer, persons employed in the personnel department in a confidential capacity relating to labour relations, staffing co-ordinator – hospital, secretaries to the following: director of nursing, (hospital), director of nursing (home), administrators, assistant administrators, associate administrator, comptrollers, chief of staff and executive director; persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students employed in a co-operative training programme and persons covered by subsisting collective agreements or persons covered by a certificate issued by the Ontario Labour Relations Board to the Civil Service Association of Ontario (Inc.)." (53 employees in the unit). (Having regard to the agreement of the parties).

0807-75-R: United Steelworkers of America (Applicant) v. Triad-Triumph Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (21 employees in the unit).

0864-75-R: International Brotherhood of Electrical Workers, Local Union 911 (Applicant) v. Wallaceburg Hydro Electric System (Respondent).

Unit: "all office and clerical employees of the Wallaceburg Hydro Electric System at Wallaceburg, Ontario, save and except the superintendent, the foreman, the office supervisor, persons above the rank of office supervisor, students working during the annual vacation, persons regularly employed for not more than 24 hours per week, and all employees covered by the existing agreement between Wallaceburg Hydro Electric System and Local Union 911, I.B.E.W.". (5 employees in the unit). (Having regard to the agreement of the parties).

0885-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Concrete Pipe Company – A Division of Standard Industries Limited (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener).

Unit: "all employees of the respondent working at or out of the Township of Gloucester, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, quality control personnel, office and sales staff, and students employed during the school vacation period." (41 employees in the unit).

0886-75-R: Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Applicant) v. The Borden Company Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Windsor, save and except supervisors, persons above the rank of supervisor, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in the unit).

0891-75-R: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deep Forest Products Co. Ltd. (Respondent).

Unit: "all employees of the respondent in its Woods Operations in the Township of Doherty and Bannerman and those townships immediately adjacent thereto, save and except foremen, persons above the rank of foreman, office staff and scalers." (17 employees in the unit).

0927-75-R: Service Employees Union, Local 210 affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Clinton Public Hospital (Respondent).

Unit: "all employees of the respondent employed at its Hospital in Clinton, Ontario, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nurses, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, technical personnel, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (56 employees in the unit). (Having regard to the agreement of the parties).

0930-75-R: Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L.-C.I.O.-C.L.C.(Applicant) v. Standard Brands Canada Limited (Respondent).

Unit: "all employees in the Quality Control Department, Laboratory Technicians at 1075 Ellesmere Road, Scarborough, Ontario, excluding microbiologists, foremen and those above the rank of foreman, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (3 employees in the unit). (Having regard to the agreement of the parties).

0934-75-R: The Hotel and Club Employees' Union Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Plaza Hotels Ltd. (Respondent).

Unit: "all employees of the respondent at the Plaza Hotels Ltd.in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, front desk staff, cashiers and management trainees." (20 employees in the unit). (Having regard to the agreement of the parties).

0938-75-R: Operative Plasterers' & Cement Masons International Association of the United States & Canada Local 124, Ottawa – Hull (Applicant) v. Carpentry House, Div. of Bleco Developments Ltd. (Respondent).

Unit: "all plasterers and Plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (For the purposes of clarity, the Board declared that drywall tapers are included in the bargaining unit.).

0939-75-R: RCA Victor Employees' Association (Applicant) v. RCA Limited (Respondent).

Unit: "all employees of the respondent at its service depot in Windsor, Ontario, save and except salesmen, administrators, managers and persons above the rank of administrator and manager." (9 employees in the unit). (Having regard to the agreement of the Parties).

0940-75-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Strathroy (Respondent).

Unit: "all employees of The Strathroy Parks, Community Centres and Recreation Commission at Strathroy, Ontario save and except the recreation director and parks superintendent and nursery school superintendent and persons above that rank, administrator and persons regularly employed for not more than 24 hours per week." (7 employees in the unit). (Having regard to the agreement of the parties).

0970-75-R: Laborers International Union of North America Local 491 (Applicant) v. BG Checo Engineering (Ontario) Limited (Respondent) v. Local Union 1687 of The International Brotherhood of Electrical Workers (Intervener).

Unit: "all construction labourers employed by the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen, persons above the rank of non-working foreman and persons covered by a subsisting collective agreement between the intervener and the Sudbury Electrical Contractors Association effective March 11, 1974," (4 employees in the unit). (Having regard to the representations of the parties).

0971-75-R: Labourers International Union of North America, Local Union #493 (Applicant) v. M-W Fence Contractor (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Townships of Kerns, Harley, Casey, Hudson, Dymond, Harris, Firstbrook and Bucke in the District of Timiskaming, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0972-75-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #75 (Applicant) v. Dufferin Steel Limited (Respondent) v. Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener).

Unit: "all employees of the respondent company situated in the Municipality of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office staff and those covered by a subsisting collective agreement between the respondent and International Brothers of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 938." (63 employees in the unit).

0973-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Roberts-Gordon Appliance Corporation Limited (Respondent).

Unit: "all employees of the respondent in Grimsby, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (18 employees in the unit). (Having regard to the agreement of the parties).

0983-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Capital Paving Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed as Truck Drivers at or out of the Company's yard operation at Guelph in the County of Wellington, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, office and sales staff, and students employed during the school vacation period." (15 employees in the unit). (Having regard to the agreement of the parties).

0986-75-R: Amalgamated Clothing Workers of America (Applicant) v. Xerox of Canada Limited Oakville Toner Plant (Respondent).

Unit: "all employees of the respondent at its Toner Plant located at 1333 North Service Road East in Oakville, Ontario, save and except foremen, foreladies, supervisors, persons above the rank of foreman, forelady, and supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in the unit). (Having regard to the agreement of the parties).

0988-75-R: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. Rankin's Hardware Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*). (For the purposes of clarity, the Board declared that carpenters and carpenters' apprentices who may be involved in the respondent's retail and manufacturing facilities are not included in the bargaining unit.).

0992-75-R: The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions 1316, 1617, 1940 and 2041 (Applicant) v. Carmac Construction Company Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton in the Township of Pickering in the County of Ontario, engaged in the installation and erection of acoustical and drywall, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (For the purposes of clarity, the Board declared that drywall tapers are not included in the bargaining unit.).

0994-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Estwood Carpenters (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0995-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0997-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent).

Unit: "all employees of the respondent in the counties of Peterborough, Victoria and the Provisional County of Haliburton, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (28 employees in the unit).

1003-75-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Applicant) v. Chester Drive-In Cleaners (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant and store at 1708 Weston Road in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and outside sales staff, drivers, students employed for the school vacation period, and persons regularly employed for not more than twenty four hours per week." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1005-75-R: Labourers International Union of North America, Local 607 (Applicant) v. Collavino Brothers Construction Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1013-75-R: Ontario Nurses' Association (Applicant) v. Board of Management of the District of Kenora Home for the Aged (Respondent).

Unit: "all registered and graduate nurses employed by the respondent in the Town of Kenora engaged in a nursing capacity, save and except the assistant director of nursing and director of inservice training and persons above that rank." (15 employees in the unit). (*Having regard to the foregoing*).

1014-75-R: The United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. P L S Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1018-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Wm. Noseworthy Excavating Limited (Respondent) v. "Employees Association" For Wm. Noseworthy Excavating Limited (Intervener) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1020-75-R: London and District Service Workers Union, Local 220, S.E.I.U.-A.F. of L., C.I.O., C.L.C. (Applicant) v. Telephone Answering Service of Sarnia Limited (Respondent).

Unit: "all employees of the respondent at Sarnia, regularly employed for not more than twenty four hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1022-75-R: Service Employees Union Local 268 (Applicant) v. The Canadian National Institute for the Blind (Respondent).

Unit: "all employees of the respondent at Cumberland Hall, Thunder Bay, Ontario, save and except Matrons and those above the rank of Matron, Office and Clerical Staff, Teaching Staff, Case Workers, Driver-Guides, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1025-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P. C. Carpenter (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1032-75-R: Labourers' International Union of North America Local 1081 (Applicant) v. R. C. Pruefer Co. Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

1037-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Pop Shoppes (Hamilton) Limited (Respondent). v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, those above the rank of foreman, office, sales staff and persons regularly employed for not more than 24 hours per week." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1044-75-R: United Steelworkers of America (Applicant) v. Horton CBI Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent at Fort Erie save and except professional engineers, squad leaders, foremen or supervisors; persons above the rank of squad leader, foreman, supervisor, personnel department clerks, buyers, one secretary to each of the following: -manager of operations, treasurer, and construction manager; students hired during the school vacation period, trainees hired in the advancement program, employees who regularly work for not more than twenty-four (24) hours per week and employees covered by subsisting collective agreements." (76 employees in the unit). (*Having regard to the agreement of the parties*).

1048-75-R: Canadian Union of Public Employees (Applicant) v. Fort Erie Public Library Board (Respondent).

Unit: "all employees of the Fort Erie Public Library Board at Fort Erie, save and except the Deputy Chief Librarian, persons above the rank of Deputy Chief Librarian, and persons regularly employed for not more than 24 hours per week." (not stated employees in the unit).

1049-75-R: International Molders & Allied Workers Union (Applicant) v. Roberts Welding and Fabricating Co. Ltd. (Respondent).

Unit: "all employees of the respondent in Embro, Ontario, save and except production management personnel and office staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1050-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. G & P Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1058-75-R: Labourers' International Union of North America Local 247 (Applicant) v. MacDonald Construction Drilling and Blasting (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

1059-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rank Yonge-Sheppard Developments Limited (Respondent).

Unit: "all construction labourers employed on residential construction by the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton, and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (30 employees in the unit).

1072-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Besner Brothers Construction Limited (Respondent).

Unit: "all employees of the respondent working at its gravel pit in Murphy Township, District of Chatham, save and except foremen and persons above the rank of foreman." (8 employees in the unit).

1073-75-R: Oil & Gas Technicians, Service, Domestic and General Workers Union, Local 1267 (Applicant) v. York Sanitation Co. Ltd. (Respondent).

Unit: "all employees of the respondent working in and around Metropolitan Toronto, save and except foremen, persons above the rank of foreman, sales staff, office staff and persons regularly employed for not more than 24 hours per week." (39 employees in the unit).

1082-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Fine Papers London Papers London Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of London, County of Middlesex, save and except foremen, persons above the rank of foreman, office and sales staff." (26 employees in the unit).

1091-75-R: Labourers' International Union of North America, Local 527 (Applicant) v. Bethell Concrete Products Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office staff, salesmen and persons regularly employed for not more than 24 hours per week." (16 employees in the unit).

1092-75-R: International Association of Bridge, Structural and Ornamental Ironworkers Local 721 (Applicant) v. EMI Sound & Vision Equipment Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1093-75-R: International Association of Bridge, Structural and Ornamental Ironworkers Local 721 (Applicant) v. Kabelmetal (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1097-75-R: Teamsters Union Local 879 (Applicant) v. Servico Limited (Respondent) v. Employee (Objector).

Unit: "all employees of Servico Limited at its Niagara Falls Home Comfort Center in the city of Niagara Falls, save and except foremen, dispatchers, and persons above the rank of foreman and dispatcher, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1101-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. N.J.D. Contracting Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1103-75-R: United Brotherhood of Carpenters and Joiners of America, A.F.L. C.I.O. C.L.C. (Applicant) v. Tillotson Plastics Industries Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Hay and Stephen Townships, save and except foremen, persons above the rank of foreman, office and sales staff." (15 employees in the unit).

1106-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Wix Corporation Limited (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (228 employees in the unit). (*Having regard to the agreement of the Parties*).

1115-75-R: International Union of Operating Engineers Local 793 (Applicant) v. Regional Crane Rentals Limited (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1129-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Scott Electric Installations Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1130-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Gidor Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Applications Certified Subsequent to Post-Hearing Vote

5388-73-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Andco Anderson Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener #1) v. Local Union 105, International Brotherhood of Electrical Workers (Intervener #2) v. United Association, Local Union 67 (Intervener #3).

"all truck drivers and stores personnel employed by the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except foremen, persons above the rank of foreman and persons covered by subsisting collective agreements." (91 employees in the unit). (For the purposes of clarity the Board declared that pick-up truck drivers are not included in the bargaining unit).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant	4	
Number of ballots marked against applicant	0	

9533-75-R: Ottawa Typographical Union, No. 102 (Applicant) v. Le Droit Ltee (Respondent) v. Graphic Arts International Union, Local 224, Ottawa (Intervener).

Unit: “all employees of the commercial printing plant of Le Droit Ltee in the City of Ottawa in the Regional Municipality of Ottawa-Carleton and Province of Ontario, save and except non-working foremen and persons above that rank, salesmen, security guards and those persons covered by subsisting collective agreements.” (86 employees in the unit).

Number of names of persons on voters' list		80
Number of persons who cast ballots	78	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	49	
Number of ballots marked in favour of intervener	28	

0706-75-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Alexandra Marine and General Hospital (Respondent).

Unit: “all employees of the respondent at the Alexandra Marine and General Hospital at Goderich, Ontario, who are regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff, students employed during the school vacation period, and persons covered by a subsisting collective agreement.” (33 employees in the unit).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant	21	
Number of ballots marked against applicant	6	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

7365-74-R: Teamsters Union, Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Livingston Transportation Limited (Respondent) v. International Woodworkers of America (Intervener). (15 employees).

0518-75-R: United Steelworkers of America (Applicant) v. The Kendall Company (Canada) Limited (Respondent) v. International Union of Operating Engineers Local 796 (Intervener) v. Group of Employees (Objectors).

Unit #4: “all students of the respondent employed during the vacation periods at its Howden Road warehouse location, Toronto, Ontario.” (3 employees in the unit).

(Bargaining Unit #1 and #3 – See Bargaining Units Certified – No Vote Conducted).

(Bargaining Unit #2 – See Certification Dismissed Subsequent to Post-Hearing Vote).

0697-75-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. General Bakeries Limited (Respondent). (5 employees).

0707-75-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Catalano Produce Ltd. (Respondent). (6 employees).

0834-75-R: Mississauga Public Library Staff Association (Applicant) v. City of Mississauga Public Library Board (Respondent). (122 employees).

0850-75-R: Marble Masons Tile Layers and Terrazzo Workers' Union No. 31 (Applicant) v. Speed Drywall Limited (Respondent) v. International Brotherhood of Painters and Allied Trades, Local Union 1891 (Intervener). (12 employees).

0912-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Unispec Projects Limited (Respondent). (5 employees).

0915-75-R: Canadian Union of Public Employees (Applicant) v. Tri-Town Nursing Home Limited (Respondent). (39 employees).

0932-75-R: Teamsters Local 990 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Permanent Concrete Division of Canfrage Ltd. (Respondent). (4 employees).

0936-75-R: Local 1590, International Brotherhood of Electrical Workers (Applicant) v. Bernardin of Canada Limited (Respondent).

Unit: "all employees of the company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (53 employees in the unit). (*Having regard to the agreement of the parties*).

0957-75-R: Pattern Maker's Assoc. of Toronto and Vicinity Affiliated with Pattern Makers' League of North America (Applicant) v. Toronto Pattern Works Ltd. (Respondent). (17 employees).

0958-75-R: Pattern Makers Assoc. of Toronto and Vicinity (Applicant) v. Ontario Pattern Works Ltd. (Respondent). (4 employees).

0959-75-R: Pattern Makers Assoc. of Toronto and Vicinity (Applicant) v. Standard Patterns Limited (Respondent) v. Group of Employees (Objectors). (17 employees).

0960-75-R: Pattern Makers Assoc. of Toronto and Vicinity (Applicant) v. Modern Pattern Works Limited (Respondent). (23 employees).

0999-75-R: Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Applicant) v. Humpty Dumpty Foods Limited (Respondent) v. Employee (Objector). (7 employees).

1015-75-R: The United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Dor-Kraft Building Materials Limited (Respondent). (3 employees).

1016-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Louis Electric (Respondent). (13 employees).

1033-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Gidor Electric (Respondent). (5 employees).

1036-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bach-McDougall Engineers and Contractors Limited (Respondent). (2 employees).

1042-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Scott Electric Installations Limited (Respondent). (2 employees).

1043-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Stare-sina Electric (Respondent). (5 employees).

1045-75-R: Canadian Union of Operating Engineers (Applicant) v. Gibson Willoughby Company Limited (Respondent) v. Group of Employees (Objectors). (5 employees).

1053-75-R: United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. Victor Izgherian Construction (Respondent). (5 employees).

1054-75-R: United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. Karlik Construction Limited (Respondent). (2 employees).

1055-75-R: United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. Shelby Investments Incorporated (Respondent). (2 employees).

1089-75-R: Local Union 105 International Brotherhood of Electrical Workers (Applicant) v. Paul Moffat Electric Limited (Respondent). (2 employees).

Certification Dismissed Subsequent to Pre-Hearing vote

6727-74-R: National Association of Broadcast Employees and Technicians, CLC (Applicant) v. The Ontario Educational Communications Authority (Respondent).

Voting Constituency: "All persons employed by the Ontario Educational and Communications Authority as Director/Producers working in and/or out of Metropolitan Toronto." (41 employees).

Number of names of persons on revised voters' list	23
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	14

7529-74-R: Graphic Arts International Union London Local 517 (Applicant) v. Strike-Rite Matches Limited (Respondent).

Voting Constituency: "All employees employed in the following departments of Strike-Rite Matches Limited, located at London: lithographic press, letterpress, typesetting, art, paste-up, camera, stripping and platemaking, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff." (16 employees).

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	
Ballots segregated and not counted	49
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	10

0603-75-R: International Woodworkers of America (Applicant) v. Terry Travel Trailers Ltd. (Respondent).

Voting Constituency: "All employees of the respondent in the City of Renfrew, Ontario save and except assistant managers, persons above the rank of assistant manager, office and sales staff, persons employed for not more than twenty four hours per week and students employed during the school vacation period." (87 employees).

Number of names of persons on voters list		86
Number of persons who cast ballots		55
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	48	

Certification Dismissed Subsequent to Post-Hearing Vote

0243-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 43 (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent engaged in cleaning and maintenance at the respondent's Viora Condominium Apartment, Don Mills, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (4 employees in the unit).

Number of names of persons on voters' list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	2	

0518-75-R: United Steelworkers of America (Applicant) v. The Kendall Company (Canada) Limited (Respondent) v. International Union of Operating Engineers Local 796 (Intervener) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at its Curity Avenue Location, Toronto, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (21 employees in the unit).

Number of names off persons on voters list		2
Number of persons who cast ballots		2
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	1	

(Bargaining Unit #1 and Unit #3 – See Bargaining Units Certified – No Vote Conducted).

(Bargaining Unit #4 – See Application for Certification Dismissed – No Vote Conducted).

0716-75-R: Christian Labour Association of Canada (Applicant) v. Halliday Homes Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Burlington, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period." (46 employees in the unit).

Number of names of persons on voters list		30
Number of persons who cast ballots		28
Number of ballots marked in favour of applicant	12	

Number of ballots marked against applicant

16

0764-75-R: Warehousemen and Miscellaneous Drivers Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Kert Chemical Industries Inc. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except superintendents, persons above the rank of superintendent, office and sales staff, students employed during the school vacation Period." (67 employees in the unit).

Number of persons on revised voters' list		53
Number of persons who cast ballots	47	
Ballots segregated and not counted	5	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	25	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0937-75-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of York (Respondent). (70 employees).

0962-75-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bailey Construction Company Limited (Respondent). (33 employees).

1008-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Hodder Avenue Development Ltd., Ram Realty Inc., Uni-Ram Development, Inc. (Respondent). (2 employees).

1012-75-R: Ontario Nurses' Association (Applicant) v. Lady Minto Hospital, Cochrane (Respondent). (44 employees).

1019-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bot Construction (Canada) Limited (Respondent). (16 employees).

1057-75-R: Hotel and Restaurant Employees and Bartenders International Union, Restaurant, Cafeteria and Tavern Employees Union Local 254 (Applicant) v. Commercial Caterers Ltd. (Respondent). (25 employees).

1071-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Grand Banks Holding (Ontario) Limited (Respondent). (6 employees).

1102-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richard & B. A. Ryan Ltd., Contractors (Respondent). (2 employees).

1110-75-R: Oil Chemical & Atomic Workers International Union (Applicant) v. Wiltshire Caterin8 (Respondent). (13 employees).

1136-75-R: The Carpenters' District Council of Toronto and vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Bramalea Consolidated Developments Limited (Respondent). (8 employees).

Applications For Declaration Terminating Bargaining Rights

0736-75-R: Herbert Harroun, Arthur LeBlanc, Mike Hodge, Lorne Wainman, Terry Gogolin, Michael Snowball & Chris Smith (Applicants) v. International Chemical Workers Union Local 880 (Respondent) v. Mansonville Plastics Ltd. (Intervener). (*Granted*).

Unit: "all employees of the Mansonville Plastics in Ajax, save and except foremen, persons above the rank of foreman, office and sales staff, highway truck drivers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots		16
Ballots segregated and not counted	6	
Number of ballots marked in favour of Respondent	0	
Number of ballots marked against Respondent	10	

0879-75-R: Employees of Texral Fibres (Goderich) Ltd. (Applicant) v. Boot and Shoe Workers Union (Respondent). (46 employees). (*Dismissed*).

0954-75-R: Wieslaw Anton (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent). (6 employees). (*Dismissed*).

1098-75-R: Production Workers, R. E. Harding Limited (Applicant) v. Sheet Metal Workers' International Association, A.F.L.-C.I.O.-C.L.C., Local Union 269 (Respondent) v. R. E. Harding Limited (Intervener). (15 employees). (*Dismissed*).

Applications For Declaration That Strike Unlawful

0978-75-U: Libby, McNeill and Libby of Canada, Limited (Applicant) v. Local 107, Canadian Union of Operating Engineers, and Manse Williams and others (Respondents). (*Direction*).

0979-75-U: Libby, McNeil & Libby of Canada Limited (Applicant) v. Frank Van Dorselaer, Jr. and Others (Respondents). (*Withdrawn*).

0990-75-U: The Lummus Company Canada Limited (Applicant) v. L. D. Aitchison, *et. al.* (Respondents). (*Direction*).

0991-75-U: The Lummus Company Canada Limited (Applicant) v. Labourers' International Union of North America, Local 1059; Frank Grant; Jack King; Norm Ribey; John Murray; W. MacIntosh; Bruce Bolton; George Becker; D. Weiss; B. Carruthers; G. Moore; T. Stack; Eric Thacker; M. Yule; Robert Williamson; D. Scott; C. Lemont; G. Kayeman, G. Kares D. Thompson (Respondents). (*Direction*).

1064-75-U: Andco Anderson Limited (Applicant) v. J. Annesty, L. Arsenault, *et. al.* (Respondents). (*Direction*).

1077-75-U: Adam Clerk Company Limited (Applicant) v. W. Baumann and Others (Respondents). (*Direction*).

1078-75-U: Adam Clark Company Limited (Applicant) v. C. Aubin and Others (Respondents). (*Direction*).

1123-75-U: Konvey Construction Company Limited (Applicant) v. International Union of Bricklayers Stonemasons and Plasterers Local No. 5 (Respondent). (*Direction*).

1171-75-U: Renold Canada Ltd. (Applicant) v. Jack M. Oldroyd, Howard Cogger and Gino Mercante (Respondents). (*Withdrawn*).

Applications For Consent To Prosecute

0130-75-U: Canvin Products Limited (Applicant) v. Vernon Passerino, Hugh McKnight and Robert Clark (Respondents). (*Granted*).

0131-75-U: Canvin Products Limited (Applicant) v. Vernon Passerino, et al (Respondents). (*Dismissed*).

0554-75-U: United Steelworkers of America CLC (Applicant) v. Fielding Lumber Company Limited (Respondent). (*Withdrawn*).

0820-75-U: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. Marble Masons, Tile Layers, Terrazzo Workers Union, Local 31, Lathers International Union, Local 562, Agostino Simone, Kenneth Weller, Chester deToni, Dino Morson, Lido Drywall Limited, Speed Drywall Limited (Respondents). (*Withdrawn*).

0827-75-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. MacDonald and Son (Timmins) Ltd. (Respondent). (*Dismissed*).

0892-75-U: Canadian Union of Public Employees (Applicant) v. Ross Memorial Hospital (Respondent). (*Withdrawn*).

0949-75-U: The Canadian Union of Operating Engineers, Local 101 (Applicant) v. Olympia and York Developments Limited (Respondent). (*Withdrawn*).

0955-75-U: Toronto Newspaper Guild, Local 87 and Donald Anderson, Audrey Coull and James Edmonds (Applicants) v. The Globe & Mail and Orval McGuire (Respondents). (*Withdrawn*).

1001-75-U: Retail Clerks International Association (Applicant) v. Shop Easy Stores (Respondent). (*Withdrawn*).

1002-75-U: Retail Clerks International Association (Applicant) v. Loblaws – Division of Westfair Foods Ltd. (Respondent). (*Withdrawn*).

1069-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Bailey Construction Company Limited, Allan Pariman and Orval McColun (Respondents). (*Withdrawn*).

Complaints Under Section 79 (Unfair Labour Practice)

5044-73-U: Canadian Textile & Chemical Union (Complainant) v. Dorothea Knitting Mills Limited (Respondent). (*Granted*).

6455-74-U: George Magold, Tom Houston, & others (Complainants) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Respondent) v. The Electrical Power Systems Construction Association (Intervener). (*Dismissed*).

0066-75-U: Mrs. Catherine Ann Revenberg, R.N. S.C.M. (Complainant) v 1. The Religious Hospital-ers of Hotel Dieu of St. Joseph of the Diocese of London 2. Hotel Dieu of St. Joseph Nurses' Associ-ation 3. Ontario Nurses' Association (Respondents). (*Dismissed*).

0461-75-U: Jim Zorzi, Brian Nadaline, and other employees of Zehr's Markets Limited as listed on Schedule "A" (Complainants) v. Diamond "Z" Association (Respondent). (*Granted*).

0597-75-U: Barrie Typographical Union, No. 873 (Complainant) v. The Barrie Examiner (Respon- dent). (*Granted*).

0789-75-U: Local Union 1687 of the International Brotherhood of Electrical Workers (Complainant) v. Noront Construction and Maintenance (Respondent). (*Withdrawn*).

0790-75-U: Canadian Union of Operating Engineers (Complainant) v. Eastwood Food Services Lim- ited (Respondent). (*Withdrawn*).

0821-75-U: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Complainant) v. Marble Masons, Tile Layers, Terrazzo Workers Union, Local 31; Lathers International Union, Local 562; Agostino Simone, Kenneth Weller, Chester deToni, Dino Morson; Lido Drywall Lim- ited; Speed Drywall Limited (Respondents). (*Withdrawn*).

0852-75-U: Mr. John Wesley Guadeloupe (Complainant) v. (i) The Carpenters District Council of Toronto and Vicinity United Brotherhood of Carpenters and Joiners of America; (ii) Lawrence Alu- minum Incorporated (Respondents). (*Dismissed*).

0862-75-U: Local Union 1687 of the International Brotherhood of Electrical Workers (Complainant) v. Noront Construction and Maintenance (Respondent). (*Withdrawn*).

0881-75-U: Retail Clerks International Association (Complainant) v. ToP Drug Mart (Respondent). (*Withdrawn*).

0894-75-U: Mr. Anthony Faria (Complainant) v. Domtar Construction Materials Ltd. (Respondent). (*Withdrawn*).

0917-75-U: Labourers International Union of North America, Local 607 (Complainant) v. Sub-Strata Construction Ltd. (Respondent). (*Terminated*).

0929-75-U: Toronto Typographical Union No. 91 (Complainant) v. Swift-O-Type Limited (Respondent). (*Withdrawn*).

0944-75-U: United Steelworkers of America (Complainant) v. Triad-Triumph Ltd. (Respondent). (*Withdrawn*).

0948-75-U: The Canadian Union of Operating Engineers, Local 101 (Complainant) v. Olympia and York Developments Limited (Respondent). (*Withdrawn*).

0956-75-U: Toronto Newspaper Guild, Local 87 and Donald Anderson, Audrey Coull and James Edmonds (Complainants) v. The Globe and Mail (Respondent). (*Withdrawn*).

0964-75-U: Teamsters Union Local 938 (Complainant) v. Lakeview Builders Supply Ltd. (Respondent). (*Withdrawn*).

0977-75-U: International Beverage Dispensers' & Bartenders' Union, Local 280 of the Hotel & Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Complainant) v. Le Coq D'Or Restaurant Limited known as Le Coq D'Or (Respondent). (*Withdrawn*).

0982-75-U: Teamsters Local Union 879 (Complainant) v. Capital Paving Ltd. (Respondent). (*Withdrawn*).

0998-75-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F. of L., C.I.O., C.L.C. (Complainant) v. Telephone Answering Service of Sarnia Limited, Sarnia, Ontario (Respondent). (*Withdrawn*).

1031-75-U: International Beverage Dispensers and Bartenders' Union, Local 280 (Complainant) v. Le Coq D'Or Restaurant Limited (Respondent). (*Withdrawn*).

1046-75-U: Darrel Randolph Weed (Complainant) v. Division 113, Amalgamated Transit Union (Respondent). (*Withdrawn*).

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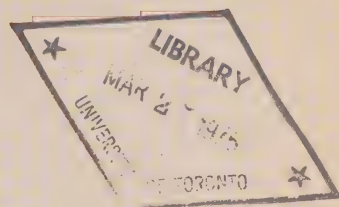
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REPORTS**

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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BEFORE: D. H. Kates, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES AT THE HEARING: *T. Wohl and B. Janisse for the applicant; C. M. McKeown, Q.C., W. Brown, H. Buxbaum and R. Sylvester for the respondent; V. Calzonetti, S. M. Mousseau and S. Klootra for the objectors.*

DECISION OF D. H. KATES, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY. November 12, 1975

2. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, professional medical staff, office staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

3. A statement of desire expressing opposition to representation by the applicant trade union was filed by the group of objecting employees. The Board determined in the normal course that the petition, if given credence, would cast a doubt on the applicant's membership evidence justifying an order directing a representation vote under section 7(2) of the Act. Therefore the representatives of the group of objectors were called upon to adduce evidence relating to the origination, preparation and circulation of the petition in accordance with our usual practice.

4. Mrs. Sharron Mousseau is a registered nursing assistant employed by the respondent nursing home. She is also chairman of a committee of staff representatives elected by employees to represent their interests in airing grievances with the respondent employer. The committee has been in existence for approximately three years. Mrs. Mousseau was elected along with her colleagues to the position of staff representative in March, 1975. The committee in its dealings with the respondent has obtained some employer concessions in connection with conducting its affairs. For example, a room at the respondent's premises is reserved to the committee for arranging meetings of employees on matters of common concern. A bulletin board has been allocated on the employer's premises for posting notices relevant to the committee's work. At a time concurrent with the applicant's application for certification the evidence also establishes that negotiations were being conducted between the committee and the representatives of the respondent with a view to increasing employees' salaries. These meetings, according to the evidence of Mrs. Mousseau, were initiated by the committee. Mrs. Mousseau indicated that four meetings with management had taken place dealing with the salary negotiations since her election as staff representative.

5. The evidence also establishes that the applicant's organizational campaign commenced in May, 1975 and continued throughout the summer months until the date of application on September 12th. It appears that reference was made by representatives of the applicant throughout its campaign to the terms and conditions of employment of employees

engaged in like capacities at the Komoka Nursing Home in persuading employees to support its attempts to obtain bargaining rights. The Board was advised by counsel for the respondent that "there existed some financial relationship" between the respondent and the Komoka Nursing Home. No further elaboration of the nature of this relationship was forthcoming during the course of these proceedings. The applicant trade union is the exclusive bargaining agent for the service employees engaged by Komoka.

6. The evidence further establishes that employees approached by representatives of the trade union became disenchanted with the union's alleged misrepresentations perpetrated during the course of the campaign. Mrs. Anne Burrows, a nurses aide, complained that wages earned by employees at Komoka were not \$1.00 more per hour as represented to her. She also indicated that the scheduling of shift work at Komoka was not more favourable as alleged to the schedules applied by the respondent employer. Mrs. Sandra Tetreault testified that a representative for the applicant, Mr. Jack Nichols, had misled her with respect to maternity leave and shift work at the Komoka Home. She also stated that Mr. Nichols had misled her in connection with the applicant union's membership position and indicated to her it was too late for her to file a petition in opposition to the trade union. Mrs. Mousseau stated that many employees upon learning of the misinformation circulated during the campaign sought the advice of the staff representatives indicating that they had changed their minds about the trade union and wanted to cancel their membership. No attempt was made by the representatives of the applicant to contradict this testimony nor was an adjournment requested with a view to adducing evidence in reply to the allegations. The sole objection made by counsel pertained to the relevance of the testimony adduced in connection with the applicant's campaign tactics. The Board ruled at the time that such evidence, if true, was material in that it may have directly induced the employees to start up a petition.

7. The negotiations for salary increases were adjourned at a meeting on July 15, 1975 by mutual consent of the employer and the committee until the beginning of September. On September 4, 1975 the respondent circulated the following bulletin amongst employees in the bargaining unit for their information:

"September 4th, 1975

TO ALL STAFF:

We hope that we will see all of you at the meeting called for Tuesday, September 9th, 1975, at 2:45 p.m.

We again wish to talk with you regarding wages and working conditions consistent with our policy of keeping you in step with our unionized homes.

A lot of you will be wondering what has happened at Komoka, and we understand that you have been handed some campaign literature from the union on this subject.

As far as Komoka is concerned, this pamphlet overstates the case in our opinion. This decision has not yet been finalized, and we are in the

process of launching an appeal to the courts. This may result in a change in this decision, or in finalizing it, but will take time.

It is our opinion that the rates spelled out in this award are so rich that they are going to cause very real financial difficulty for the Komoka Home. We believe that the union itself is beginning to realize this too.

We expect that the Komoka situation will be clarified within thirty days, and ask you to please be patient with us. We also ask that you not make any hasty decisions at this time.

The law of the Province of Ontario is specific in stating that every employee has the right to join the trade union of his choice, and we as management are not permitted to interfere in any way. We ask you, however, to remember that we have been as good as our word in the past, and will continue to be so.

As stated, we are launching an appeal, and also are meeting with the Nursing Home Association, who are approaching government in the hope of obtaining financial assistance, and we hope to have some results within thirty days, and will again meet with you to discuss the status of the Komoka situation at that time.

Sincerely,

H.T. Buxbaum, President

W. Brown, Administrator

R.L. Silvester

8. On September 9th a meeting of employees proceeded as scheduled in the respondent's circular. Prior to the meeting, however, representatives of management met with the staff representatives and made a proposal for settling their salary dispute. The staff representatives thereupon proceeded to submit the respondent's proposal to the employees for their opinion. Mrs. Mousseau addressed the employees indicating that if they should refuse the employer's offer then the committee would simply resume negotiations. On the other hand, if they indicated acceptance of the wages, then Mr. H. Buxbaum, on behalf of management, desired to address the meeting. The employees approved the respondent's offer. Mr. H. Buxbaum thereupon addressed the employees. Mrs. Mousseau stated that he made particular reference to the respondent's circular referred to in paragraph 4 herein. He explained the necessity for clearing up some of the misrepresentations indulged in by the applicant's representatives during the course of the campaign and particularly made note of the bargaining situation at the Komoka Nursing Home.

9. On September 15th a notice was posted on the employee bulletin board for a meeting of employees scheduled for the afternoon of September 18th. On September 16th five staff representatives visited the Komoka Nursing Home in London, Ontario. The staff representatives were initially received by a Registered Nursing Assistant employed at the Komoka Nursing Home and they explained to her that they were employees at a Nursing Home in Chatham who wanted to inspect the premises. They were permitted access to the

premises and were assured that the patients would answer any questions that they wished to ask. No contact was made with any member of management of the Komoka Home.

10. According to Mrs. Mousseau, the trip to Komoka confirmed the suspicions held by the staff representatives with respect to the alleged misrepresentations perpetrated by the applicant trade union during the course of the campaign. There were in fact two meetings of employees held on the afternoon of September 18th. The evidence establishes that thirty employees attended the 2:00 p.m. meeting and fourteen employees attended the meeting at 3:30 p.m. There was some confusion in the evidence as to whether employees whose shift was about to terminate attended the later meeting and the employees whose shift was about to commence attended the earlier meeting. Nevertheless the testimony of Anne Burrows clearly indicates that employees on shift left their job stations to attend the meeting upon satisfying their supervisor that an employee remained behind to attend to urgent situations. This was normal procedure that had been pursued in the past in connection with meetings called by the committee to discuss matters of employee concern. There was no attempt by the group of objectors to conceal a procedure that in their view was a practice that had been established since the setting up of the committee system.

11. At the meeting Mrs. Mousseau reported the committee's findings in connection with the Komoka Home inspection. The employees thereupon discussed the situation and resolved to prepare a petition indicating the employees' change of mind with respect to representation by the applicant trade union. The evidence also establishes that a petition was in the process of being circulated prior to the meeting but was subsumed by the statement of desire prepared by Mrs. Mousseau and presented to the employees in attendance at the two meetings on September 18th. Of the forty-two employees in attendance all but three employees signed the petition. The balance of the signatures on the statement were secured the next day by Mrs. Mousseau at the employees' homes. Mrs. Mousseau mailed the petition to the Board on September 19th.

12. The issue before the Board is whether in the circumstances the statement of desire filed herein may be viewed as a voluntary expression of employees' wishes. Counsel for the applicant submitted that the petition to all intents and purposes was prepared and circulated on the employer's premises and during employee working hours thereby justifying the conclusion that the document was the product of the employer's tacit if not direct approval. Incidental to the conclusion that the petition was supported by the employer was the influence exerted by members of management through the vehicle of the committee of staff representatives. That is to say, the committee in openly dealing with the employer with respect to terms and conditions of employment would thereby inferentially transmit the employer's sentiments with respect to trade union representation at the meetings attended by them on September 18th where the petition was prepared and circulated. The circular dated September 4th was submitted in evidence during the course of Mrs. Mousseau's cross-examination for the sole purpose of establishing employer knowledge of the applicant's campaign. Counsel upon inquiry from the Board again repeated that the sole purpose of filing the circular was to establish management knowledge of the trade union's campaign prior to the filing of the application. In other words no other purpose was intended to be served by that document. Counsel for the employer made no objection to the admission of the circular.

13. The Board is satisfied that a practice with respect to dealing with employer-employee relations through the vehicle of the committee of staff representatives was in existence far in advance of the applicant's organizational campaign. According to Mrs. Mousseau this informal bargaining relationship often resulted in the resolution of grievances to the mutual satisfaction of the employer and employee. A meeting room and bulletin board was set aside on the employer's premises for the purpose of conducting business relating to the employees' terms and conditions of employment. The uncontradicted testimony of the witnesses also establishes that meetings were often held on the employer's premises during working hours and without deduction of pay provided the patients' needs had been attended to in advance. In the circumstances of this case the evidence also remains uncontradicted that the committee and the employer were engaged in negotiating salary increases at the committee's request before the onset of the applicant's campaign. We do not hold that the ongoing relationship established by the committee with the respondent employer ought to be frustrated merely because of the supervening occurrence of a union organizational campaign. In such situations the relationship between the respondent and the committee should not be treated any differently than the relationship established by an incumbent trade union upon an application by an applicant trade union to displace those bargaining rights. In such situations a representation vote is normally directed extending an opportunity to employees to select one of the two competing bargaining agents. In the circumstances of this case, the committee's only available avenue to compete with the applicant was to create a like situation through sponsoring a petition. In doing so, we are of the view that benefits accumulated through past association with the employer need not be altered. We are satisfied by the uncontradicted evidence that because of employee repugnance with the applicant's conduct of its campaign there was some basis for employee dissatisfaction that found expression in the preparation and circulation of a petition. In other words, the applicant trade union through application of its own peculiar tactics to convince employees to support its claim for bargaining rights established the basis for the support of the committee's strategy to preserve the status quo. In absence of any attempt by the applicant to contradict the evidence of the witnesses we find that the applicant's behaviour was very much the cause of the origination of the petition.

14. In order that the Board's findings not be misinterpreted in future situations, we would not have tolerated the petition had there been some basis for holding that it was the product of a "fanciful bargaining committee" established with the expressed view of frustrating an applicant trade union's organizational campaign. Had the bargaining committee been formed coincidentally with the campaign or with the purpose of disguising justification for the preparation and circulation of the petition on the employer's premises and with his tacit approval we would have set aside the statement of desire.

15. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 22, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

18. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER OLIVER HODGES.

1. I dissent.

2. I am compelled to deal with a preliminary evidential issue before proceeding to the merits of the case. The majority will only consider the employer's circular dated September 4th as evidence relating to one issue. The basis for this holding is the applicant's counsel's assertion that he sought to use the circular only to prove the fact of employer knowledge. The majority supposes the respondent's counsel believed that the circular would only be considered relevant to that one issue and hence he did not turn his mind to the possibility of rebutting the significance of the circular with respect to other issues. Therefore, if the Board were to consider the circular as evidence relevant to other issues, the respondent's counsel would have been denied the opportunity to know and meet the case against him. This holding extends the requirements of natural justice too far in a proceeding where the Board carries the inquiry. The respondent's counsel would have been misled only if the Board had actually ruled, at the time the circular was entered into evidence, that it would be received as proof of only one issue. This the Board did not do. Accordingly, the respondent's counsel should have been on notice that the customary rule of evidence applied, namely, that the trier of fact and law, the Board, could consider the import of the evidence in respect of all issues to which it was relevant. In explaining why the Board should not be restricted in its use of the evidence to the purpose for which it was adduced by counsel, one can do no better than quote the following words of Edmund Burke, "a judge is not placed in that high position merely as a passive instrument of the parties, he has a duty of his own, independent of them, and that duty is to investigate the trust." (The quotation is taken from Wigmore, *A Student's Textbook of the Law*, at p.443). To hold otherwise is to misconceive both the duties of the Board and counsel. The Board is under no duty to alert counsel to the possible significance of every piece of evidence admitted. Professional counsel are employed because it is expected that they will recognize and confront all the issues, both actual and potential which may bear upon their client's position. Counsel ignores at his own peril the full range of issues to which evidence may be relevant where that evidence is admitted *without qualification by the Board*. It is also well established that the Board on its own motion will look into the circumstances surrounding the preparation of a statement of desire. Such petitions are scrutinized by the Board even where the applicant union makes no challenge. (see section 48(5) of the Regulations). It is hard to believe that the respondent's counsel, who is experienced in labour relations, would have been lulled into foregoing the opportunity of countering what was potentially a very damaging inference from the circular in a case such as this where the management signatories to the circular, the obvious persons to counter any damaging inferences arising therefrom were available at the hearing to be called. Such complacency, on the part of experienced counsel is unusual when evidence is introduced that is relevant to an area of inquiry in which the Board is known to be particularly vigilant. The Board has a duty to ensure that employees are given the opportunity to express their own true wishes free from management influence. Thus it has been loath to accept petitions at face value for it has recognized the vulnerability of employees to their employer's pressures, both direct and indirect. (Piggott Motors (1961) Ltd., 63 CLLC para 16,264).

3. Accordingly, I would hold that the Board is free to use the circular as evidence in respect of all issues to which it is relevant including employer interference in the formulation of the petition. If perchance the respondent did forego the opportunity to present reply evidence on this point because he was misled, he should be invited to apply for reconsideration of the Board's decision pursuant to section 95(1) if he is of the opinion that he can present relevant reply evidence and argument. The availability of such recourse should remove any danger of his being denied natural justice.

4. Turning to the merits of the case, there is serious doubt as to the validity of the objectors' statement of desire for its origin is shrouded in circumstances which suggest management influence. Three events are particularly telling. First, the respondent issued the September 4th circular which contained a veiled threat that the advent of a union as bargaining agent would precipitate a financial crisis by securing excessive wage rates for the employees. The inference to be drawn by the employees is of course obvious. Representation by a union would jeopardize their jobs. This circular also served another purpose. It indicated to the employees that the respondent was opposed to the applicant trade union. Second, on September 9th, the respondent made a wage offer. Mrs. Mousseau, the chairman of a committee of staff representatives, solicited the employees' approbation of that offer while they were in a room on company property with Mr. Buxbaum, the President of the Company, close at hand waiting to address them if their acceptance was forthcoming. Finally, on September 18th, two meetings were held on company property during working hours with Mrs. Mousseau once again in charge. Mrs. Mousseau at this time acted as the prime mover of a petition opposing the applicant. She was so persuasive that all but three of forty-two employees signed the petition. The way in which the employees were persuaded to sign this petition leaves much to be desired. They were subjected to a barrage of management activity designed to defeat the union. The September 4th circular and the September 9th wage offer are the prime features of this campaign. Then the role of Mrs. Mousseau must be considered. As the President of a committee of staff representatives, she must have been identified with management in the eyes of the employees. Indeed, it would be reasonable to infer that the employees might have believed that she would report on any who waived in loyalty to the respondent's position. In such circumstances, it becomes impossible to accept the petition as being a voluntary expression of the employees' wishes. Therefore, it can be given no weight. In reaching this conclusion, reliance is placed on the Board's decision in *Canadian Hanson & Winkle Company Limited* (1968) OLRB January M. R. 963 where in similar circumstances the Board ignored such a petition. The case is particularly relevant because there the prime mover behind the petition was an employee named Killen who was also "the leading figure" in a Workers Council. His position and unrestricted movements in conjunction with other company actions designed to persuade the employees to oppose the union were such that the Board observed:

The actions of the respondent in the month of October, the role played by Killen in the Workers' Council and the manner in which he circulated the petition after the instant application was made might even suggest to the employees that Killen was promoting the petitions at the behest of the respondent.

5. Accordingly, I would grant the applicant certification without a vote for the petition must be given no weight.

ADDENDUM

1. The majority has read the dissent of our colleague, Mr. O. Hodges, and wishes to make a number of comments thereto.
2. During the course of an inquiry into the origination, preparation and circulation of a statement of desire the Board, by practice, assumes carriage of the proceedings. After the Board's interview of a witness is completed, the parties' are extended the right to cross-examine the witnesses on matters relevant to the issue.
3. In the instant case the circular referred to in the majority decision was introduced in evidence by counsel for the applicant through the witness, Mrs. Mousseau. The Board inquired of counsel the purpose that the document was to serve. Counsel indicated it was being introduced solely for the purpose of establishing employer knowledge of the applicant union's organizational campaign. Neither counsel for the employer or the group of objectors objected to the circular being entered.
4. After the hearing the Board during the course of its deliberations analysed the contents of the circular and discerned that there may be some grounds for discerning "a veiled threat" to the employees' employment status by implication of a certain arbitration award granted in The Komoka Nursing Home dispute.
5. Nevertheless, the majority upon further deliberation noted that counsel for both the respondent and group of objectors would not have addressed themselves to that issue in light of the applicant's representation that the introduction of the circular was solely restricted to establishing employer knowledge of the campaign.
6. During the course of these proceedings there were no charges filed alleging employer wrongdoing with respect to the origination, preparation and circulation of the petition. Furthermore, the applicant did not cross-examine Mrs. Mousseau or any other other witness called by counsel for the objectors with respect to any employer intimidation or threat in connection with the document. Nor did counsel for the applicant during the course of argument submit that employer interference was in any way directed towards the job security of employees who had signed the petition.
7. Should the Board set aside the statement of desire on the basis of the employer's circular dated September 4, 1975 we would be denying both the employer and objecting employees a full opportunity to adduce evidence on matters relevant to our inquiry. Furthermore, by virtue of the applicant's own conduct during the course of the proceedings, we are of the view that these parties had no reason to anticipate that that issue would be a relevant consideration in the Board's deliberation. In other words, the Board is not satisfied that we will have conferred a fair hearing should we accede to our colleague's dissenting opinion.
8. We do not intend to speculate on how the other parties may have conducted themselves had the issue been properly raised during the inquiry. Counsel may have exercised its discretion to call evidence in reply for the purpose of explaining or justifying the contents of the document. He may have argued that the employer was properly exercising "its freedom of speech" privilege provided under section 56 of the Act. The employees may have indicated in reply that their objective view of the applicant as reflected in the petition

was established for in advance of receiving the September 4th circular having regard to the uncontradicted evidence of their repugnance to the applicant's campaign tactics. Whatever the nature of the representations that could have been made in reply, the parties were not conferred the opportunity of electing to do so. Surely, discerning "the truth" of a disputed issue presupposes hearing all the parties at a fair and proper inquiry. If authority is required for this self evident proposition, the parties are referred to *The Toronto Newspaper Guild and Globe Printing Co. case* 51 CLLC ¶15,003 (HC); 51 CLLC ¶15,039 (CA); 53 CLLC ¶15,056 (SCC).

0987-75-R Toronto Newspaper Guild, Local 87 (The Newspaper Guild, AFL-CIO-CLC), (Applicant) v. **Bargain Hunter Press**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members L. Hemsworth and P. J. O'Keeffe.

DECISION OF THE BOARD: November 10, 1975

1. This is an application filed under section 95(1) of the Act for reconsideration of a Board decision dated October 15, 1975 certifying the applicant trade union for a group of the respondent's employees. Because the submissions filed in support of the respondent's claim for reconsideration pertain to matters of Board practice and procedure, it may serve some useful purpose to set out the respondent's letter in full:

"October 24, 1975

Mr. A. M. Brunskill,

Ontario Labour Relations Board,

400 University Avenue,

TORONTO, Ontario.

Dear Sir:

Re: Toronto Newspaper Guild, Local 87, and Bargain Hunter Press,
O.L.R.B. File No. 0987-75-R

The writer has been retained as counsel by Bargain Hunter Press, the Respondent upon the above-noted Application for Certification which we understand was heard by the Board on Wednesday, October 15, 1975.

We have reviewed the matter with Mr. T. Mooney, who appeared for the Respondent at the Hearing, and we have had an opportunity of re-

viewing the Board's Decision forwarded to Mr. Mooney by letter dated October 17, 1975, and received by him on Wednesday, October 22, 1975.

We are writing this letter on behalf of the Respondent to request the Board to reconsider its Decision and to vary the same by directing a vote of the employees or, alternatively, to re-open the Hearing for further consideration, pursuant to s. 95(1) of The Labour Relations Act, R.S.O. 1970, c.232.

We understand from our discussions with Mr. Mooney that the Respondent has approximately 25 employees who are relevant to the Application and that the Applicant Union has filed evidence of membership on the part of 17 of those employees. Apparently some of the employees had left the employ of the Respondent during August and September, well in advance of the terminal date of October 2, 1975. We also understand that a Petition against the Union was presented at the Hearing by certain objecting employees, which Petition bore the signatures of 17 employees. A review of the Board's Decision indicates that the objecting employees' Petition was rejected because of the failure of the representatives of the group of objectors to adduce first hand testimony of its origination, preparation and circulation. Apparently the objecting employees, who were not represented by counsel, had not realized that it would be necessary for *all* persons who were involved in the origination, preparation and circulation of the Petition to be present at the Hearing and consequently only Nancy Scharfe, one of the two employees so involved, was present to testify. The other employee so involved, namely, Heather Davis, was not present. It is true that in those circumstances first hand testimony of the origination, preparation and circulation of the Petition could not be given to the Board, but we are advised that it was indicated to the Board that Heather Davis could be made readily available to give her evidence within a period of less than half an hour and that, in effect, a request was made of the Board for a short adjournment for that purpose. The Board apparently declined to do so and to hear the evidence of Heather Davis.

It is clear that the Petition filed by the objecting employees is of vital significance in these proceedings because if there is any major overlap between the signatures on the Petition and the evidence of membership of the Applicant then the Applicant may not be in a position for certification at all, and, even if there is only a partial overlap the Applicant would be in a vote position.

In such circumstances it is, in our submission, of great importance that the Board ought to have been apprised of all of the evidence relating to the origination, participation and circulation of the Petition, which was readily available, in order to be in a position to make its Decision and so that the parties would have received, and would seem to have received, a full and fair Hearing.

It is for these reasons that we respectfully submit that the Board ought to reconsider its Decision and either vary the same by directing a vote of the employees of the Respondent or, in the alternative, re-open the Hearing for further consideration.

Yours very truly,

MINDEN, GROSS, GRAFSTEIN & GREENSTEIN

R. A. Blair”

2. The respondent employer’s submissions may be summarized as follows:
 - (a) The group of objecting employees are lay persons not cognizant of Board procedures in connection with the duty to adduce direct evidence with respect to the origination, preparation and circulation of a petition and should not thereby be prejudiced;
 - (b) the Board ought to have granted an adjournment to the objecting employees to enable them to produce the necessary witnesses to complete the evidence with respect to origination, preparation and circulation of the petition; and
 - (c) the Board in absence of granting an adjournment has denied the group of objecting employees “a full and fair hearing”.
3. The Board’s *Notice To Employees Of Application For Certification And Of Hearing* (Form 5) reads as follows:

“8. Any employee or group of employees who has informed the Board in writing of his or their desire in accordance with paragraphs 5 and 6 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each signature was obtained.”

At the bottom of the Notice To Employees is appended the following Explanatory Note:

*Explanatory Note: Where employees fail to attend in persons or by a representative or to testify or produce witnesses to testify as provided in paragraph 8 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.
4. The Board through the *Rules on Practice and Procedure* adopted to discharge its duties and responsibilities under the Labour Relations Act has gone to great lengths to bring to the attention of interested employees notice of a Board proceeding that may affect

their rights. The respondent has not argued that the notice was inadequate or otherwise unclear with respect to the requirements of employees who attend the hearing with a view to adducing evidence in support of a petition. It merely attributes the shortcomings in the employees' conduct to the fact that they "were not represented by counsel and had not realized it would be necessary for *all* persons who were involved in the origination, preparation and circulation of the petition..." The Board is of the view that that excuse standing alone is insufficient to justify an order reopening the case. (See; *The Formosa Springs Brewery case* OLRB M.R. October 1974 696 at pp697 to 700 for a review of the authorities).

5. Counsel also submits that the Board failed to grant the objectors an adjournment in order to enable one, Heather Davis, to appear to adduce evidence. In the first instance upon review of our notes the Board does not recall that a motion for an adjournment was requested by either the group of objecting employees or the respondent for that purpose. The circumstances giving rise to this particular issue ought to be reviewed. It appears upon learning of the applicant's formal application Miss Nancy Scharfe discussed with Miss Heather Davis and another employee the advantages of trade union representation. Miss Davis arranged to call a lawyer for advice with respect to the preparation of the statement. No one called by the group of objecting employees could recall the name of the lawyer who was contacted. (Yet one of the grounds for reconsideration was that the group of objecting employees were without the benefit of counsel). Miss Davis thereupon composed the preamble to the petition which was subsequently typed by Miss Scharfe. Miss Scott's evidence indicates that Miss Davis first approached her with respect to signing a petition. She thought about it and later signed the document upon presentation by Miss Scharfe. Mrs. Kippax a supervisor for the evening employees also testified that she was approached by Miss Davis to sign the document and she acceded to the request. Upon completing the campaign to secure the signatures Miss Davis undertook to send the petition to the Board.

6. In brief, it appears that Miss Davis was the principal protagonist behind the petition. She did not attend the hearing to give first hand evidence of her role in the campaign to oppose the applicant's attempts to secure bargaining rights. We only learnt of the extent and nature of her contribution through other witnesses to the proceedings. In other words, the evidence was not adduced through personal knowledge and observation but mostly through indirect testimony that in many instances offended the hear-say rule.

7. After the case for the group of objectors had been closed counsel for the applicant argued that the Board's practice with respect to requiring direct evidence of origination and circulation of the petition had not been complied with and requested that the petition be set aside. After counsel had completed his submissions the Board explained the Board's practices to the group of objectors and the representative of the respondent, Mr. Mooney. At that point Mr. Mooney explained that "Tuesday was a busy day at the office" and for that reason Miss Davis could not attend. No request for an adjournment was made. Nevertheless, assuming but without conceding that a request for an adjournment was made at that time, we would have found it unconscionable to accede to such a request. The group of objectors, however innocent of the appropriate rules of procedure, would have made the request after they had closed their case and after counsel for the applicant had completed his representations in connection with the propriety of the document. Surely, it would do violence to the fundamental rules of a fair hearing to permit a party to adduce evidence to perfect its case after it has learnt of its shortcoming from opposing counsel during the course of his argument!! (See; *Re Hotel and Restaurant Employees Union and Nick Masney Hotels et al*

70 CLLC ¶14,020 (CA) Laskin, J.A. for a review of Board practice with respect to adjournments).

8. Counsel requests that the application for reconsideration be entertained in order that we permit Miss Davis to adduce testimony with respect to her role in securing the petition. Counsel however failed to offer to produce Mr. Gonzales, the distribution manager, as a witness with respect to the issue of the propriety and voluntariness of the petition. Mr. Gonzales is employed as both the distribution and office manager of the respondent company. By agreement of the parties he was excluded from the bargaining unit because he exercised managerial functions under section 1(3)(b) of the Act. The testimony of Miss Scott indicates that upon the posting of the Board's notices Mr. Gonzales, the employees direct supervisor, invited each of the office employees into his office. It appears that he called each individually and upon completing his interview requested the employee to send in a colleague. Miss Scott testified that Mr. Gonzales asked her if she had anything to do with the trade union. She indicated that she didn't want to answer and walked out of the office. In cross-examination, however, Miss Scott was asked what she discerned from the interview and confessed that Mr. Mooney the publisher, would be very upset if the trade union came in. (See; *The Metal Textile Limited* case OLRB M.R. November 1971 694 for an example of the effect of managerial influence on evidence of representation whether it be membership cards in support of an application for certification or a petition in opposition to an application). This evidence was not contradicted by any witness called to adduce reply testimony on behalf of the respondent.

9. Finally, the Board notes that counsel is applying for reconsideration on behalf of the Bargain Hunter Press after "we have reviewed the matter with Mr. T. Mooney, who appeared for the respondent at the hearing". No employee in the bargaining unit allegedly aggrieved by the Board's conduct in disposing of the statement of desire has sought reconsideration of this matter. The Board is inherently suspicious of an employer's request for review in circumstances where it is alleged that "a full and fair hearing" has been denied employees who have a direct interest in the outcome of Board decisions and who remain silent after a Board certificate granting bargaining rights has issued. In other words, the respondent's status for requesting reconsideration on the grounds referred to in its letter is highly questionable. (See; *The Rexdale Heating Limited* case OLRB M.R. March 1974 115 at p117 where reference is made to *The Cunningham Drug Stores Ltd.* case 72 CLLC ¶14,167 at p14,694 per Martland J. where the S.C.C. defines and delimits the employer's status to challenge Board decisions that are more appropriately the concern of employees).

10. For all of these reasons, the respondent's request for reconsideration is denied.

11. The Board notes the agreement of the parties submitted in writing to the Board's Labour Relations Officer dated October 29, 1975 settling the respondent's lists of employees filed in reply to the instant application. As a result thereof E. Bearden should be removed from the lists in that this person was not an employee on the date the application was filed. H. Sanger is added to the lists in that this person was an employee on September 24th, the date of the filing of the application.

12. A formal certificate granting bargaining rights for the unit of employees described in paragraph 2 of the Board's decision dated October 15, 1975 will issue.

1162-75-U Acme Building and Construction Limited, (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 446, (Respondent).

BEFORE: T. E. Armstrong, Q.C., Chairman.

APPEARANCES: *M. R. Speigel and R. C. Griffith for the applicant; no one for the respondent.*

DECISION OF THE BOARD: November 12, 1975

1. This is an application pursuant to section 82 of *The Labour Relations Act* for a declaration that a strike, purportedly called or authorized by the respondent was unlawful.
2. The respondent filed a reply contesting the application but did not appear at the hearing. The applicant was represented at the hearing by its president, M. R. Speigel, and one of its project managers, R. C. Griffith, both of whom testified.
3. The applicant is a general contractor, engaged by the Ministry of Environment of the Government of Canada to construct a building to be known as the Great Lakes Forest Research Centre in Sault Ste. Marie. This six million-dollar project was commenced approximately two years ago and is in the final stages of completion. The applicant has employed various numbers of carpenters during the course of the project and asserts that it is currently bound by a collective agreement with the respondent union. In addition, at all times material to this application, at least two of its subcontractors, B & H Woodworkers and Darling Carpet Installation, employed carpenters who are members of the respondent union.
4. On October 20, 1975, the applicant had one carpenter in its employ: Graham Smith, one of the respondents named in a companion application for a declaration of unlawful strike (Board File No. 1163-75-U). On the same day, B & H Woodworkers employed seven carpenters and Darling Carpet Installation four carpenters, all working on the site and all of them were members of the respondent.
5. During the morning of October 20, 1975, a firm called Hot – Pak, from Kitchener, arrived on the site to erect one or more environmental chambers. According to the applicant, its contract with the federal Ministry of the Environment provided for that ministry's own contractor to do this special installation work. The persons employed by Hot – Pak were not members of the respondent union; two were tinsmiths supplied to Hot – Pak by Smith & Ellson, the applicant's mechanical subcontractor, and two were supplied to Hot – Pak by Canada Manpower.
6. Shortly after the installation work commenced, the applicant's job superintendent, R. C. Griffith, was asked by a member of the respondent, one Herman (who is also the respondent's shop steward at B & H Woodworkers), if the four men employed by Hot – Pak were members of the respondent. Griffith replied that he did not know. Later, Henry Therien, the respondent's business representative, came to the site and asked the four employees to produce their union cards. They were unable to do so. According to Griffith, Therien then directed all twelve carpenters on the site, including Graham Smith, the applicant's single carpenter-employee, to take their coffee break, although the break was not due to commence for another half-hour. Therien joined them for the break and, after some minutes, left the site. Shortly after his departure, all twelve carpenters walked off the job.

7. The next day, October 21, all twelve men returned to the project but refused, or failed, to report for work. Griffith reported the matter to Therien, who is alleged to have expressed surprise. Griffith then requested twelve replacements, and confirmed his request by telegram. Later the same day, Therien came to the site and asked to see the foreman for Hot – Pak. Hot – Pak's foreman refused to meet with him. Griffith reiterated his request for twelve carpenters and Therien replied, "I've still got 24 hours under the contract."

8. On October 23, all twelve carpenters returned to work. There has been no further disruption or work stoppage since that time. The applicant conceded that the withdrawal of services on October 20, 21 and 22 was the only work stoppage that had occurred during the life of the project and that it had no reason to believe that there would be any further interruption in the project, which is expected to be completed within three weeks.

9. Two aspects of the case are somewhat unusual and deserve special comment. First, the applicant was unable to produce and identify the collective agreement which, it alleges, is now in force. The respondent filed a collective agreement with its reply. That agreement, in which Acme and the respondent are named as "the Contractor" and "the Union", respectively, provides for a two-year term, expiring April 1977, and bears Mr. Spiegel's signature. Spiegel, however, contended that that agreement is not now in force, having been superseded, on August 11, 1975, by another collective agreement between the Sault Ste. Marie Builders' Exchange (on behalf of a number of employers, including the applicant) and the respondent. However, the applicant was unable to produce a copy of that agreement.

10. In order to succeed in an application under section 82, it is obvious that an applicant must prove that the alleged strike is untimely. Where, as here, the assertion is that a strike has occurred in mid-contract, the existence of the collective agreement must be established. It is true that we have the applicant's uncontradicted assertion that a collective agreement is in force. However, in matters of this sort, especially where, as in this case, collateral proceedings have been taken which may give rise to monetary and penal consequences, it is important that the evidence be precise before any positive finding is made. Without precise evidence as to the nature of the contractual relationship between the applicant and the respondent, I am reluctant to make a finding which might be at odds with findings made in those collateral proceedings.

11. Under the Act, a collective agreement is defined with precision. It must be between an employer or employers' organization and a trade union or council of trade unions; it must be in writing; it must contain provisions respecting terms or condition of employment or rights; privileges or duties of the employer, the employers' organization, the trade union or the employees; it must be for a fixed duration, of not less than one year, etc. Unless the Board is able to examine the document itself, it cannot satisfy itself that these various specific statutory requirements have been met. The mere assertion by one of the parties that a collective agreement exists is not, in my view, conclusive in applications of this sort. This is one of those cases – an application for a declaration that a lock-out is unlawful is another – where the Board may properly require the production of the agreement itself. Put another way, this is a case where it is not unduly onerous or unfair to insist upon the best available evidence: i.e., the actual collective agreement.

12. The second somewhat unusual aspect of the matter is that, at the time of the work stoppage, the respondent had only one carpenter in its employ. There is persuasive author-

ity for the proposition that one employee cannot engage in a strike, in the light of the statutory definition of strike, (section 1(1)(m)) which refers to a “cessation of work, a refusal to work or to continue to work *by employees in combination or in concert or in accordance with a common understanding ...*” (Emphasis added): see, for example, *Thomas Fuller v. Rochon*, (1957) CLLC ¶15,349 (Ontario Supreme Court).

13. In view of my disposition of the application, it is not, strictly speaking, necessary to rule on the question. However, it will be recalled that eleven other carpenters, in addition to Graham Smith, participated in the work stoppage. While the concept of strike, at common law and by statutory definition, entails collective, concerted action and, hence, a plurality of participants, there is no reason, in my view, why a single employee of one employer joining with other employees of another employer cannot be said to be engaging in a strike within the mean of the Act. Such a view is at least suggested by the decision of the Ontario Court of Appeal in *Swansea Construction Company Limite v. The Royal Trust Company*, (1956) CLLC ¶15,298, although the facts of that case were, in some particulars, distinguishable.

14. The conclusion which I favour cannot be applied indiscriminately. For example, the statutory definition suggests that there must be some commonality of interest as well as co-ordination of activity. Those elements seem to me to be present here, where there is a common situs and where members of a single craft union, employed by different employers, take concerted action to achieve common goal. However, as I have said, the question need not be finally determined in order to dispose of this application.

15. It has often been said that the declaration is not meant to be punitive. One of its main purposes is to impart information and by informing to induce a cessation of the unlawful activity. This purpose and rationale is well-known in the industrial relations community. Moreover, the practical success of the declaration, as a technique for bringing an end to unlawful activity, is well-established. In the majority of cases, the mere prospect of an adverse declaration is sufficient to prompt a return to work. If declarations were to be issued in all cases, regardless of the return to work, the inducement to avoid a pronouncement and to return to work voluntarily might well be diminished. This is one of the reasons why the Board is reluctant to issue an affirmative declaration, except in limited circumstances: namely, where the strike continues, or where, although the strike is over, there is a pattern of past unlawful conduct, or there is a reasonable apprehension of a resumption of unlawful conduct, or where the activity complained of is part of a deliberate and planned defiance of a public statute: see *Norfolk Hospital Association*, [1974] OLRB Rep. 581, and *Acoustical Association Ontario et al.*, Board File No. 0476-75-U, decision dated July 7, 1975.

16. Accordingly, the application is dismissed.

1094-75-R Canadian Paperworkers Union, (Applicant) v. Morgan Adhesives of Canada Limited, (Respondent) v. Group of Employees, (Objectors).

BEFORE: K.M. Burkett, Vice-Chairman, and Board Members F.W. Murray and P.J. O'Keefe.

APPEARANCES: *Gary D. Bacella, Doug Wray and Bud Gallie for the applicant; Robert D. Weiler, Dave Murphy and Carl F. Beatty for the respondent; Ernie Riemert, Robert Brydges, Norm Cresswell, John Hails and Jim Thompson for the objectors.*

DECISION OF VICE-CHAIRMAN K.M. BURKETT AND BOARD MEMBER P.J. O'KEEFE: November 18, 1975.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Brampton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board finds that there are 116 employees in the bargaining unit described in paragraph 3 above, and that the applicant trade union filed 75 membership documents on or before the terminal date which the Board sets for the purpose of ascertaining the number of employees in the unit who were members of the trade union for purposes of the application. Seventy-three (73) of these membership documents correspondent with the names of employees in the appropriate bargaining unit. In such circumstances the Board would normally certify the applicant pursuant to section 7(2) of the Act. In this instance, however, a statement of desire was filed with the Board listing the signatures of some seventy-two (72) persons purporting to be employees of the respondent company who were opposed to the certification application. Thirty-two (32) of the signatures appearing on the statement of desire correspond with the membership evidence thereby making it necessary for the Board to inquire as to the circumstances surrounding the origination, preparation and circulation of the statement of desire. If it is found to be a voluntary expression of the true wishes of the employees who signed it, it will cast sufficient doubt upon the membership evidence submitted by the applicant as to allow the Board, as per its practice in these matters, to order a representation vote also pursuant to section 7(2) of the Act.

5. Form 5, *Notice to Employees of Application For Certification and of Hearing*, which was posted at the respondent company's place of business details certain pre-requisites of form and time which must be met if the Board is to accept a statement of desire. The statements filed with the Board in this matter complied with these pre-requisites. In addition, paragraph 7 of Form 5 clearly outlines the Board requirements with respect to the first hand testimony required in support of a statement of desire in accord with Rule 48(5) of the Board's Rules of Procedure. Paragraph 7 of Form 5 states:

"Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to

testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed and (b) the manner in which each of the signatures was obtained.

EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant."

6. The statement of desire or petition begins with the following preamble:

"We the undersigned here by signify we do not wish to be represented by, the Canadian Paper Works Union, in employment relationship with our employer Morgan Adhesive of Canada Ltd."

Four employees of the respondent company appeared before the Board to give evidence as to the circumstances surrounding the origination, preparation and circulation of the petition. Mr. E. Rienart was designated spokesman and appeared first.

7. Mr. Rienart testified that he has been employed by the company for approximately six years and that at the time the petition was circulated he was employed as a "Floater"; a classification used for the purpose of covering-off absences and assisting in those areas where the workload requires additional manpower. The job is not supervisory or managerial although persons occupying the floater classification have considerable freedom to move about the plant.

8. Mr. Rienart testified that he had nothing to do with the drafting of the petition. He first saw the document when it was handed to him by Mr. R. Brydges in the "Compound room" shortly before the commencement of the midnight shift on Wednesday, October 15, 1975. Mr. Rienart signed the document and proceeded with it to the back of the No. 1 line where he had decided to assist the "Backtender" for that shift. He placed the petition on the desk located there and during the first hour approximately 10 persons approached, one at a time, and signed the document. The witness testified that he witnessed signatures (2) through (16); between the hours of 12 midnight and 7 a.m., signature #16 being affixed shortly before 7:00 a.m., at which time he handed the petition back to Mr. R. Brydges. Mr. Brydges later testified, however, that he had taken custody of the document for a short time between 4:30 a.m. and 5:00 a.m. at which time he witnessed signatures #17 and #18 in the retail department. The testimony is confusing in so far as it does not seem possible that signature #16 was witnessed by Rienart at 7:00 a.m. if in fact signatures #17 and #18 were witnessed by Mr. Brydges at 4:30 a.m.

9. Mr. Rienart testified that he had possession of the petition from midnight until 7:00 a.m. (He made no mention of the transfer of the petition to Mr. Brydges at 4:30 a.m.) and that during coffee breaks he kept the document in his pocket. After relinquishing custody to Mr. Brydges at 7:00 a.m. he did not retain custody again although he saw the petition the following night. Mr. Rienart was not involved in the mailing or delivery of the document. He testified that he did not discuss at any time the certification application or the petition in opposition to it with any supervisor or management person.

10. Under cross examination, Mr. Rienart testified that although it was the usual practice of the supervisor to check with him, during the first half hour of the shift the supervisor did not visit until about half way through the shift. The reason for this was an "important, expensive order" which was being processed on line #1 which required the supervisor's attention at the front of that line. The witness testified that when the supervisor did visit he made no effort to hide the petition and admitted that the supervisor could have seen the names on the document.

11. Mr. Rienart admitted that the employees signed during working hours and that he witnessed the signatures while he was working. He stated, however, that six employees came to the back of the line on a clean up and signed then and that the others took only a minute or so each. The supervisor did not question the movement of persons to the back of line #1.

12. The next witness called in support of the statement of desire was Mr. R. Brydges who has been employed as a "Compounder" with the respondent company for the past five years and 7 months. Mr. Brydges works steady midnights.

13. Mr. Brydges testified that he saw the posted form 5 and drafted the petition on Monday October 13, 1975. The form 5 however was not posted until 1:00 a.m. on Tuesday, October 14, 1975. The Board accepts that Mr. Brydges was unsure of the specific date. In any event he drafted the preamble at home without advice or assistance and took the document to work with him in the evening of Tuesday, October 14, 1975, prior to the commencement of his shift at 12 midnight Wednesday October 15, 1975. He met Mr. Rienart in the "Compound room" witnessed his signature and gave the petition to him. Mr. Brydges testified that between 4:30 a.m. and 5:00 a.m. he retrieved the petition from Mr. Rienart and witnessed signatures #17 and #18 in the retail department after which he returned the petition to Mr. Rienart. Mr. Rienart in turn returned the petition at 7:00 a.m. and between 7:00 and 7:30 a.m. Mr. Brydges testified that he witnessed signatures #19 through #35 in the retail department and #36 in the production department.

14. He testified that between 7:00 a.m. and 7:20 a.m. on Thursday, October 16, 1975, he witnessed signatures #66, 67 and 68 and that on Friday, October 17, 1975, he witnessed signatures #65, #69, #70, #71 and #72 between 7:00 and 7:20 a.m.

15. Mr. Brydges testified that on October 15, 16 and 17 he delayed the taking of his coffee break until 7:00 a.m. and that he used his break time to solicit support for the petition. He usually takes his break at 6:00 a.m. Mr. Brydges handed the document to Mr. Hails shortly after 8:00 a.m. on October 15, 1975, and it was returned to him by Mr. Cresswell shortly after the start of Mr. Brydges' next shift, on October 16, 1975. Mr. Brydges maintained possession from midnight, October 16, until he personally delivered it to the Board after the completion of his shift on Friday October 17, 1975. Mr. Brydges testified that he did not discuss the certification application or the petition with anyone employed in a supervisory or managerial capacity by the company.

16. Mr. Brydges admitted during cross examination that he had approached other employees while they were working. He stated, however that there were no supervisors present although he acknowledged that there is a window in the supervisor's office which opens to the production area.

17. The third witness to appear in support of the petition was Mr. John Hails, a "floater operator" who has been continuously employed by the company for over four years. He testified that he was at the bulletin board with a number of the employees during the 4:00 p.m. shift change on October 14, 1975, at which time it was agreed that a petition would be started. Shortly after he commenced the day shift on October 15, 1975, Mr. R. Brydges approached and gave him the petition in the vicinity of line #1. Mr. Hails proceeded to solicit signatures and witnessed those numbered 37 through 49. All of these employees were approached and signed the petition while on shift. Mr. Hails testified, however, that there were no supervisors present and that he was not questioned by the supervisor with regard to his moving about.

18. Mr. Hails testified that he handed the document to Mr. N. Cresswell inside the plant at about 4:10 p.m. on Wednesday, October 15 and that he did not see the document again. He stated that he did not discuss the certification application or the petition with anyone from management although he stated in cross examination that he had been approached by a supervisor on the morning of October 14, and asked if he had heard anything about the union. He testified that at that time he had heard nothing and so indicated to the supervisor.

19. The fourth and final witness to appear in support of the petition was Mr. N. Cresswell, a "slitter operator" with the respondent company who has been in the employ of the company for about three years. Mr. Cresswell testified that he does not exercise any supervisory responsibility in the course of his duties as a "slitter operator". Mr. Cresswell has been in opposition to the union for a number of years.

20. Mr. Cresswell was given the petition by Mr. J. Hails as he began work at 4 p.m. on October 15, 1975. He had not participated in the drafting or prior circulation of the document. During the shift he witnessed signatures 50 through 64. With the exception of #62 and 63 who signed in the lunch room, all of the others were witnessed in the work area. He testified that employees came up to him, usually one at a time and that by the end of the shift the supervisor "must have realized something was happening". The supervisor, however, said nothing and did not in any way interfere with the process. Mr. Cresswell gave the petition to Mr. R. Brydges at the conclusion of his shift and did not see it again. The witness testified that he did not at any time, discuss the application for certification or the petition with anyone from management.

21. It was brought out in cross-examination that Mr. Cresswell was a member of the joint union/management communications committee which met every month or so to discuss employee grievances, etc. Mr. Cresswell testified that a "short notice" meeting of this committee was called for 8 a.m. Tuesday, October 14, 1975, the morning following the Thanksgiving holiday. He testified that the certification application was not a topic of discussion although he could not remember what was discussed at this meeting.

22. The applicant trade union called two witnesses to give testimony with respect to the circumstances surrounding the circulation of the petition. The first, Mr. Duffy has been employed by the company for three months. He testified that he was approached by Mr. N. Cresswell at approximately 4:30 p.m. on Wednesday, October 15 and asked to sign the petition. He refused. Shortly thereafter he heard Mr. Cresswell ask the supervisor, Mr. Stoneham, if he wished to sign and then witnessed Mr. Cresswell and Mr. Stoneham standing to-

gether in the presence of two packers and one other person. He testified that Mr. Cresswell made no effort to conceal the document from Mr. Stoneham. Mr. Duffey testified under cross examination that he could not hear what they were saying. He stated that he was concerned that his position with the company could be "jeopardized" because the supervisor had been given the opportunity to see that he had not signed the petition.

23. The second witness called by the applicant was Mr. Robinson who has been employed by the company as a coiler operator for 18 months. He testified that he too was approached by Mr. Cresswell during the afternoon shift on October 15, 1975, and asked to sign the petition. He refused. He later witnessed Mr. Cresswell in the lunch room jokingly ask the supervisor, Mr. Stoneham, if he wished to sign the document.

24. Mr. D. Wray appearing on behalf of the applicant trade union made a three pronged argument citing previous Board cases in support of each. He argued firstly that the Board should attach suspicion to a petition following closely on the heels of an organizing campaign as it usually does. He argued secondly that because of inconsistencies in the testimony of the objectors, the Board should reject the petition on the grounds that the objectors failed to discharge the evidentiary onus which falls to them. Thirdly Mr. Wray argued that the evidence clearly indicates at least tacit approval by the respondent company in the circulation of the petition citing the fact that most of the signatures were affixed to the petition on company premises and during working hours and that the company supervisors made no effort to question or impede its circulation. Mr. Wray argued that the signing of the document became the "safe" thing to do rather than a voluntary change of heart.

25. Mr. R. Weiler appearing on behalf of the respondent company argued that there was no evidence to support a contention of management participation citing the fact that the objectors never spoke to anyone from the management of the company and that no one from management was present when employees signed the document. He stated that whatever inconsistencies appeared in the testimony was unrehearsed. Mr. Weiler submitted that the document withstands the tests usually applied by the Board and that the Board should order a representation vote.

26. The issue before this Board is whether or not the petition filed in opposition to the application is a voluntary expression of the true wishes of the employees. In order to determine if in fact the petition represents a voluntary expression the Board places an evidentiary burden upon those who seek to rely on the document to testify from personal knowledge as to the circumstances surrounding the origination preparation and circulation of it. See the *Bausch and Lomb Optical Co. Ltd.* case (1969) OLRB. M.R. July, at page 478 where the Board said:

"The statements of desire filed with the Board must meet both the test of origination and the test of circulation. If a statement of desire meets one of the tests but cannot satisfy the other, then it is not accepted by the Board as casting doubt on the evidence of membership. See e.g. *International Hod Carriers, Building and Company Labourers' Union of America, Local 506 v. Village Contractors v. Bricklayers', Masons' Independent Union of Canada, Local 1 v. Group Of Employees* 1966 July OLRB Monthly Rep. 231 at 233; and *International Union of District 50 United Mine Workers of America v. Roxalin of Canada Ltd. v. Group of Employees* 1967 Dec. OLRB. Monthly Rep. 867."

See also *CCH Canada Ltd.* case (1965) OLRB M.R. for January at page 19, and *Formosa Spring Brewery* case (1974) O.L.R.B. M.R. October at page 696 and the cases cited therein.

27. The objectors have satisfied this burden. The testimony of Messrs. Rienart, Brydges, Mails and Cresswell gives the Board first hand evidence as to the circumstances concerning the origination of the document and the manner in which each of the signatures was obtained with the singular exception of signature #16. The Board rejects the argument of Mr. Wray that the document should be given no weight because of inconsistencies in the testimony of these four witnesses as to time and place.

28. There is a natural suspicion which attaches to a statement of desire following closely upon a union organization campaign. The Board must assure itself that the "change of heart" indicated by employees who sign the petition in opposition to the union after having indicated support for that same union, is a free choice unimpeded by overt or subtle pressures. The rationale giving rise to this suspicion is well summarized in the *Pigott Motors (1961) Ltd.* case, 63 CLLC 16, para. 16,264 where the Board stated:

"...In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. *It is precisely for this reason* and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories." (emphasis added).

29. Having regard to all of the evidence the Board is not satisfied on the balance of probabilities, that the statement of desire circulated on October 15, 16 and 17, 1975, on the premises of the respondent company reflects the true wishes of the employees who signed it.

30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board, which would support such a finding. The Board, however, must be guided by the overall environment in the workplace and the cumulative impact of events. In a not inconsiderable number of cases the Board has found on the basis of the cumulative effect of the evidence before it that unintentional acts or tacit behavior by management served to create a "climate" which thwarted voluntary expression. In the *Imperial Paving* case (1966) OLRB M.R. July at page 255 the Board said:

"...The task facing the Board is to determine whether the petitions cast doubt on the evidence of membership so as to require confirmation of that evidence by means of a representation vote. In making this determination the Board is concerned, primarily, with the question as to whether the petition were signed freely and voluntarily and truly repre-

sent the wishes of the employees. The fact that management may have intentionally set out to unduly influence the employees to sign petitions, contrary to the act, is only one facet of the problem. Management may, by its actions, influence employees unintentionally and quite by accident but if the Board is satisfied that the employees who signed the petitions were so influenced this may well be a decisive factor in determining the overall weight to be given the evidence of membership.”

See also *Rainbow Ready Mix* 63 CLLC 16,259

Inspiration Ltd. (1968) OLRB. Jan. 982

Travaelaine (1970) OLRB Nov. 879

CDN. Moldings (1967) OLRB Nov. 743

Maclean Hunter (1967) OLRB Nov. 759

Hobart Bros. (1974) OLRB Feb. 85.

31. In the instant case all but two of the seventy-two signatures appearing on the petition were affixed on company premises and during working hours. This fact is not of itself fatal to the petition. The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management. Firstly, specific reference is made to the admission of Mr. Rienart that he made no effort to hide the petition and that the supervisor could have seen the names on it.

32. Secondly, the Board refers to the testimony of Mr. Rienart that the supervisor did not visit with him at the back of line #1 during the first half hour of the shift as was his practice because an “important, expensive order” required his attention at the front of line #1. With the attention of the supervisor focused on line #1, it is inconceivable that he would not have been aware of the movement of employees to the back of that line. His failure to in any way impede the signing process would naturally be viewed by the employees as condonance if not support of the petition.

33. Thirdly, Mr. Brydges testified that he delayed his coffee break on October 16, 16 and 17 from 6 a.m. to 7 a.m. to facilitate the soliciting of signatures. In the normal course employees rarely take breaks in the last hour of a shift. The employees would logically have assumed that Mr. Brydges was away from his work and would assume as well from his freedom of movement that management condoned if not supported his activities.

34. Fourthly, a short notice meeting of the “Communication Committee” was called at 8 a.m. on October 14, 1975, the same day that the notice of application for certification was posted. Although Mr. Cresswell could not remember what was discussed at that meeting, certainly his subsequent solicitation of signatures in support of the petition could logically be viewed by the employees in the plant as an extension of a decision taken earlier that day in the communication committee meeting.

35. Fifthly, the Board refers to the testimony of Mr. Cresswell wherein he stated that by the end of the shift the supervisor must have known that something was going on. Again

the supervisor's failure to question or in any way impede the signing process which was occurring during normal working hours would logically be viewed by the employees as condonance if not support of the petition in opposition to the union.

36. And finally, the testimony of Messrs. Duffy and Robinson confirms two exchanges, innocent or otherwise, between Mr. Cresswell and Mr. Stoneham, the supervisor, which would support an inference in the minds of the employees of management support and in Mr. Duffy's case caused him to feel that by refusing to sign the petition he may have jeopardized his position with the company.

37. All of these factors taken together must cause the Board to dismiss the statement of desire. Having regard to all of the evidence before it, therefore the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 20, 1975, the terminal date fixed for this application, and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

38. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER F.W. MURRAY:

1. I dissent.

2. Having regard to all of the evidence I would have found that the petitioners acted quite openly and that the manner of circulation of the petition should not in this case affect the weight of evidence which has cast doubt on the true wishes of the employees.

3. Having carefully reviewed the evidence, I would not conclude in this case that the lack of any impediment to the circulation of the petition which might have been mounted by management would create a "climate" which would thwart the voluntary expression of the employees.

4. Accordingly; I would have given weight to the petition and ordered a representation vote.

0656-75-R International Brotherhood of Painters and Allied Trades Local 200, (Applicant) v. **Sal Piamonte & Sons Painting Contractors Ltd.**, (Respondent) v. International Union of Operating Engineers Local 796, (Intervener).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *A. M. Minsky appearing for the applicant; S. C. Bernardo and Pat Piamonte appearing for the respondent; Pamela A. Sigurdson, John Moffat and J. P. Lemay appearing for the intervener.*

DECISION OF THE BOARD: November 14, 1975

1. In a decision dated August 8, 1975, the Board issued a certificate to the applicant with respect to a bargaining unit of "all painters and painters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." In issuing this certificate the Board noted that it had not received a reply from the respondent and the division of the Board which considered this application on August 8, 1975, was unaware of any other claim of bargaining rights for the employees who were and are affected by this application.

2. In a letter which was received by the Board on September 30, 1975, the solicitors for the respondent informed the Board that the company had a collective agreement and a certificate of this Board with another trade union. [Subsequently, it became apparent the other trade union is the International Union of Operating Engineers, Local 796, hereinafter referred to as "Local 796,]. The respondent conceded that the notice of the application to the employees had been posted by the respondent and that although the respondent had received notice of the application it had not filed a reply with the Board. The solicitors stated that the painters and painters' apprentices who are covered by the certificate referred to in paragraph one herein are the same employees who are covered by the certificate and the collective agreement referred to earlier in this paragraph. The solicitors asked that the decision of the Board of August 8, 1975, be reconsidered and the certificate revoked.

3. Subsequently, Local 796 intervened in this proceeding and filed a copy of its collective agreement with the respondent and a statement which indicated dues check-off for August and September 1975. At the hearing counsel for Local 796 asked the Board to reconsider its decision dated August 8, 1975, and to revoke the certificate which was issued thereunder.

4. In a decision dated October 2, 1973, (See Board File #4359-73-R), a different division of the Board issued a certificate to Local 796 with respect to employees of the respondent. The bargaining unit which is described in the earlier certificate is described as "all employees of [the respondent] employed at and working out of The Regional Municipality of Ottawa – Carleton, save and except foremen, persons above the rank of foreman, and office and sales staff." Subsequently, the intervener and the respondent entered into a collective agreement which by its terms covers "all painters and helpers save and except foremen, persons above the rank of foreman and office and sales staff". This collective agreement by its terms became effective on December 2, 1973, and remains in effect until December 1, 1976. The instant application for certification was filed on July 24, 1975.

5. The applicant argued that the Board ought not to permit the respondent to request reconsideration of its decision on any basis because of its conduct in not replying to the application and because of the respondent's delay in requesting reconsideration of the Board's decision.

6. Counsel for the respondent admitted gross inadvertance on behalf of his client but argued that not to reconsider the decision of the Board dated August 8, 1975, would be contrary to public policy. Counsel pointed out that the Board would not have issued the certificate to the applicant if it had been aware of the outstanding bargaining rights of the intervener and referred to section 41 of The Labour Relations Act.

7. Counsel for the intervener argued that a certificate was issued to Local 796 on October 2, 1973, and that in that application the intervener had requested a bargaining unit of painters and painters' apprentices. Counsel noted, however, that after a hearing of that application determined a bargaining unit of "all employees." Counsel stressed that section 8 of the Board's Rules of Procedure requires the Registrar to serve upon any trade union known to him as claiming to be the bargaining agent of or to represent any employees who may be affected by an application a copy of the application and a notice of application in Form 10. Counsel pointed out that this had not been done.

8. At the hearing, the Board ruled that whatever might be said about the conduct of the respondent; Local 796, since it had not received notice of the instant application, was entitled to request the Board to reconsider its decision dated August 8, 1975, in the instant application.

9. Counsel for the applicant argued that the Board ought not to reconsider its decision dated August 8, 1975 in the instant application and relied on two grounds. Firstly, it was argued that the decision in which a certificate was issued to Local 796 was not with respect to an application for certification under the construction industry provisions of The Labour Relations Act and that the certificate which was issued to Local 796 is not a bar to the instant application for certification. Counsel argued that there are different rules regarding the count of the employees between construction industry applications and non-construction industry applications. Secondly, it was argued that when an industrial trade union (i.e., a trade union other than a trade union within the meaning of section 106(f) of The Labour Relations Act) applies for certification with respect to employees in the construction industry the construction industry division of the Board never determines an "all employees" bargaining unit. Reference was made to the *Winter & Son* case OLRB M.R. February 1967, p. 889, and to the *Fielding Construction Company* case OLRB M.R. January 1970, p. 1205. Counsel pointed out that in such applications the construction industry division of the Board would restrict the appropriate bargaining unit to the trades crafts or classifications which were at work on the date of the making of the application. Counsel also argued that by virtue of the provisions of section 6(2) of The Labour Relations Act, the applicant is entitled to carve out its craft of painters and painters' apprentices from an "all employee" bargaining unit at any time.

10. As the Board noted in the *Indusmin Limited* case, [1971] OLRB Rep. 264, it is not the function of the Board to act as a court of appeal upon the determination of another panel. This division of the Board is able to look at the decision of another panel of the Board. However, the Board is not able to consider the evidence which was presented to the other panel in the earlier application wherein a certificate was issued to Local 796. This division of the Board has no way of knowing on what basis the count of employees was made in the earlier application or which considerations led to the determination of an "all employee" unit. The Board notes, however, that whether a bargaining unit of "all employees" or a bargaining unit of painters and painters' apprentices was determined in the earlier application, the employees who are affected by the instant application are covered by the certificate which the Board issued on October 2, 1973.

11. The argument of counsel concerning the application of section 6(2) to this application was not supported by any decision of the Board. In our view, the provision of section 6(2) must necessarily be read in the light of section 5 of The Labour Relations Act. Local

796 has entered into a collective agreement with the respondent for a period of three years and having regard to the provisions of section 5(4) the instant application is untimely on the basis that the applicant seeks to displace Local 796 as the bargaining agent.

12. Having regard to the foregoing, the Board revokes its decision dated August 8, 1975 in the instant application and the certificate which was issued thereunder. The parties are directed to surrender the certificate and copies thereof to the Registrar.

13. At the conclusion of the hearing, counsel for the respondent requested the Board to remain seized of this application until the parties have had an opportunity to consult on the dilemma in which the respondent finds itself. The Board informed the parties that it has discharged its functions under The Labour Relations Act and that having regard to the limitations on the Board's jurisdiction as set forth by the courts in the *Brayshaws Steel Ltd.* case 71 CLLC ¶14,084 and in the *Oakville Trafalgar Memorial Hospital* case, 72 CLLC ¶14,118, the Board was without jurisdiction to proceed further in the instant application. In addition, the Board pointed out that the respondent had apparently entered into a purported collective agreement with a third trade union which is not a party to this application.

5044-73-U Canadian Textile & Chemical Union, (Complainant) v. Dorothea Knitting Mills Limited, (Respondent).

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members O. Hodges and J.D. Bell.

APPEARANCES: *M. Parent, L. Ritchie and R. Reynolds for the complainant; E.L. Stringer, Q.C. and B. Borsook for the respondent.*

DECISION OF T. E. ARMSTRONG, Q.C., CHAIRMAN, AND BOARD MEMBER J. D. BELL: November 21, 1975.

1. This complaint of unfair practice was filed January 16, 1974. In a decision issued March 14, 1974 the Board dismissed the complaint. The complainant subsequently requested the Board to reconsider its decision; a further hearing was held and on July 15, 1975 the Board directed that the grievor be reinstated in employment with compensation for loss of earnings. The relevant portion of the Board's decision reads as follows:

"15. In these circumstances, and having regard to the provisions of Section 79(4) of *The Labour Relations Act*, the Board therefore directs that the respondent forthwith reinstate Randi Reynolds pursuant to the terms as originally undertaken by Mr. Hooker as set out in Paragraph #2 herein. The parties are further directed to meet forthwith with a view to agreeing on the amount of loss of earnings if any that Randi Reynolds has sustained since June 27, 1974. In default of agreement of the parties, either with respect to the terms of the reinstatement of Randi Reynolds or with respect to the amount of loss of earnings sustained by her, the Board will remain seized of this matter."

The reference to "Paragraph #2" is to the respondent's undertaking, given at the Board's first hearing, that the grievor "will be recalled when a fourth person is required for the topping operations or if she should be found suitable for retraining in another area of its operations".

2. The parties were unable to agree upon the extent of the respondent's obligations under the Board's decision of July 15. Accordingly, on August 15, 1975 the matter was listed for continuation of hearing "for the purpose of determining whether or not the respondent [had] complied with the Board's order of July 15, 1975". Further hearings were held, and, on October 3, the Board issued a further decision, in which the majority (Mr. Murray dissenting) directed that the respondent pay to the grievor a stipulated sum of money by way of lost earnings. Subsequently, the respondent commenced proceedings under the *Judicial Review Procedure Act, 1971*, to quash the Board's determination of October 3. This motion is still pending. On October 8 the Registrar listed the matter for continuation of hearing on November 4, 1975 "to hear the representations of the parties on all outstanding issues".

3. The hearings on November 4 commenced before the panel of the Board seized with the complaint from the outset: Messrs. Boscariol, O'Keeffe and Murray. The issue before the panel was whether, in recalling the grievor on August 15, 1975, the respondent had complied with the Board's decision of July 15, 1975. In the midst of the respondent's defence to the complainant's allegation of non-compliance, a verbal altercation occurred between the counsel for the respondent and one of the panel members. As a result, the panel unanimously determined that it should retire and permit the hearing to continue before a new panel.

4. The new panel (Messrs. Armstrong, Bell and Hodges) commenced its hearing by advising the parties that it proposed to deal only with the severable issue of whether the respondent had reinstated the grievor in accordance with the Board's direction of July 15, 1975. It was further stated that any evidence with respect to that issue previously called by either of the parties would have to be reintroduced. In response to a request for clarification from the complainant, it was explained that the Board had before it only the earlier endorsements of March 14, 1975, July 15, 1975 and October 3, 1975 and that the only evidence it would consider would be the evidence tendered from that point forward. The parties were given an opportunity to make submissions with respect to the scope of the issues to be determined, as outlined by the panel, and the proposed mode of proceeding. No objections were made and the parties proceeded to call their evidence.

5. Before turning to the merits of the reinstatement issue, it should be pointed out that counsel for the respondent, by letter dated October 10, 1975, advised the Registrar that he wished to adduce evidence with respect to the compensation issue dealt with by the Board in its decision of October 3. However, he contended that since that decision was to be the subject of an application for judicial review, the presentation of such evidence should be deferred until the court application was concluded. At the hearing on November 4, this panel of the Board did not deal with the compensation issue, with the respondent's contention that it is entitled to call evidence on that issue, if necessary, once the application for judicial review is determined. That matter is still before the original panel and any representations in connection therewith, including representations as to whether the matter should be stayed pending the outcome of the court proceedings, should be directed, through the Registrar, to the original panel.

6. As to reinstatement, the thrust of the complainant's contention is that the respondent deliberately assigned the grievor to a job which was, and was known by the respondent to be, both unpleasant and unhealthy, in the hope that the grievor would resign. Such conduct, according to the complainant, was contrary to the letter and spirit of the Board's remedial order directing reinstatement. The Board, it was contended, should so hold and should make whatever further determination, either by way of a confirmatory reinstatement direction or by an additional compensation order, as might deem necessary, in order to ensure compliance by the respondent.

7. Both parties appeared to assume that the Board had jurisdiction to deal with the question of whether or not the respondent had reinstated the grievor in compliance with the direction of July 15. However, what is the source of the Board's jurisdiction in this connection? In the normal course, the enforcement of a section 79 direction would be governed by the provisions of section 79(5) of the Act, which reads as follows:

"79(5) Where the trade union, council of trade unions, employer, employers' organization, person or employee, has failed to comply with any of the terms of the determination, any trade union, council of trade unions, employer, employers' organization, person or employee, affected by the determination may, after the expiration of fourteen days from the date of the release of the determination or the date provided in the determination for compliance, whichever is later notify the Board in writing of such failure, and thereupon the Board shall file in the office of the Registrar of the Supreme Court a copy of the determination, exclusive of the reasons therefore, if any, in the prescribed form, whereupon the determination shall be entered in the same way as a judgment or order of that court and is enforceable as such." (emphasis added)

8. In this case, however, section 79(5) has not, in terms, been invoked. Are we entitled to apply the principles enunciated by the courts in *Genaire Ltd. v. International Association of Machinists and The Ontario Labour Relations Board*, 58 CLLC 875 ¶15,388 (High Court); 59 CLLC 953 ¶15,416 (Court of Appeal), and treat the matter as a request for filing of the Board's determination in the Supreme Court of Ontario, pursuant to section 79(5)? If so, is it a condition precedent to filing that we find that the respondent has failed to comply with the determination? Or is the question of compliance, or non-compliance, for the courts to determine, with an automatic obligation on the part of the Board to file its determination so long as a timely allegation of non-compliance is made by or on behalf of the party in whose favour the original determination issued?

9. The latter issue arose in *United Steelworkers of America and Chairtex Manufacturing Limited et al*, (1971) 3 O.R. 154. At p. 155, the Court states:

"The majority of the Board decided that it was a factual precondition that before it should order the filing of the determination [under s. 79(5)] the question of whether or not there was in fact a failure to comply with the determination had to be decided, and since that had not been done the Board refused to order the filing.

Mr. MacLean has argued that the Board is required to order such filing upon receiving a notice containing advice that there has been a non-compliance with the Board's determination whether or not such notice is accurate. Mr. Justice Henderson to whom the Union moved mandamus refused to accept such a submission and we think he was perfectly right in doing so.

In our view, before the Board is required to file a determination with the Registrar of the Court, it is incumbent upon anyone alleging that there has been non-compliance with a determination to prove in fact that there was such non-compliance. If it were otherwise it would mean that a mere allegation of non-compliance would give rise to automatic enforcement of an order even though the order had been complied with. We refuse to so interpret the subsection."

If the complainant's real request is for enforcement under section 79(5), it appears that we have the right and, indeed, the obligation to determine whether or not the complainant's assertion of non-compliance is correct.

10. There are two other possible sources of jurisdiction:

- (a) In paragraph 15 of its decision of July 15, the Board expressly reserved jurisdiction to deal with the terms of reinstatement "in default of agreement by the parties". The evidence establishes that the grievor, with the apparent concurrence of the complainant, agreed to accept reinstatement on August 15, on the terms proffered by the respondent. Does the grievor's subsequent dissatisfaction with the terms of the reinstatement constitute failure of or "default" in agreement so as to preserve the Board's jurisdiction to deal with the matter under its decision of July 15; or did the grievor, by accepting reinstatement, waive her right to contend that no agreement had been reached on the terms of reinstatement?
- (b) In the alternative, is it the grievor's real contention that she was the victim of new acts of anti-union discrimination in the period between her reinstatement on August 15 and the cessation of employment on September 18? If so, may we consider the matter as a fresh complaint, under the *Genaire* principle, even though no new formal complaint was lodged?

11. On the assumption that we have jurisdiction to deal with the matter; on one or other of the grounds outlined above – an assumption, incidentally, which appears to be shared by the parties – we have concluded that there is no basis for the allegations made by the grievor at the hearing on November 4. In fact, the grievor was offered and accepted work in the area of the respondent's operations for which she was deemed by the respondent to be suitable for retraining. This was one of the conditions of reinstatement stipulated in the Board's reinstatement direction. Much evidence was given concerning the conditions of the job in which the grievor was placed. It may well be that that job is less desirable than the one which she held prior to her original termination. However, in its endorsement of

July 15, the Board did not direct that she be reinstated in her former employment. The job to which she was assigned had been performed by another employee, under apparently identical circumstances, for approximately ten years. It cannot therefore be said that a disagreeable assignment was created expressly for the grievor. Indeed, the evidence discloses that the respondent took some action – the installation of an exhaust fan – in an attempt to overcome the grievor's complaints concerning fumes in her work area. Although the grievor's complaints related to the fumes, as well as to excessive steam and condensation, other witnesses working in the same area failed to corroborate the grievor's description of the unsatisfactory working conditions in that area of the plant.

12. It is true that the grievor's starting salary was low. However, it was explained that she was untrained in the work to which she was assigned; that her rate (\$2.45 an hour plus 10 cents cost of living) was a starting rate; that her potential earnings on piece work were much higher; and, finally, that when it became apparent that she was progressing satisfactorily, she received an accelerated increase in her straight time rate.

13. Little significance can be attached to the grievor's assertion that she was harassed and under constant surveillance following her recall. In fact, she conceded that her forelady was generally friendly to her. While it is true that the forelady expressed her personal opposition to the union, the evidence does not justify the inference that these remarks were made by way of a threat or that they amounted to coercion or intimidation. In fact, the forelady's reports on the grievor's progress were favourable and were the basis for the accelerated increase.

14. Much of the evidence supports the inference that the respondent was less than enthusiastic about the Board's order directing reinstatement: the staff meeting on the day preceding her recall, where the President warned against unequal or unfair treatment of the grievor; the special rehiring interview with the grievor, attended by senior management officials; the concurrent notice to employees warning against unauthorized visiting in the work locations of other employees, etc. However; in our view, none of these events, considered alone or in their cumulative impact, can be said to amount to a failure to comply with the Board's reinstatement order nor, in our view, do they constitute new and independent acts of discrimination contrary to the *Labour Relations Act*.

15. The circumstances, timing and apparent motivation for the grievor's departure from the respondent's employ on September 19 are worth noting. She left the day following her appearance as a witness before the Board, where she had testified as to her adverse working conditions. However, in advising the respondent that she was leaving she apparently offered no reasons, nor, more significantly, did she ask whether the respondent intended to take any further steps to meet her specific complaints. When asked by the Board what she was seeking by way of relief, the grievor stated that it was, for her, essentially a matter of principle; that she believed that the complaint procedure under the Act was usually ineffective and that employers are able to disregard reinstatement orders with impunity. She stated that her primary purpose was to expose those alleged weaknesses in the system. It may be that the grievor honestly holds those beliefs. However, if any objective evidence exists to support them, she failed to produce it. We must act on the evidence before us and, while we may draw reasonable inferences from circumstantial evidence, we cannot give weight to hypotheses of the sort advanced by the grievor. In fact, if any inferences are to be drawn, the most plausible one is that, following her reinstatement, the grievor had no real

wish to remain in the respondent's employ and that her separation was, in due course, inevitable – the final act in a self-fulfilling prophecy of discrimination.

16. The complainant placed much emphasis on the employer's negative and suspicious attitude following the grievor's reinstatement. In fact, the respondent was candidly apprehensive about the effect of reinstatement on other employees, particularly members of management who had been involved in the protracted Board proceedings. Despite these reservations, the employer professed a commitment to treat the grievor in an impartial manner, "no better or no worse than any other employee". While such a cautious – indeed suspicious – approach may not be conducive to the establishment of an enduring employment relationship, it does not, in the particular circumstances of this case, amount to an unfair labour practice.

17. In the result, we find that the grievor voluntarily terminated her employment on September 19, 1975. Specifically, we find that the evidence failed to support the contention either (a) that the grievor's reinstatement was not in accordance with the Board's direction of July 15, 1975, or (b) that the grievor was the victim of discrimination contrary to the Act in the period August 15, 1975 through September 19, 1975.

DECISION OF BOARD MEMBER OLIVER HODGES:

1. My understanding of the evidence compels me to find, firstly, the respondent "in default ... with respect to the terms of the reinstatement of Randi Reynolds"..., a conclusion allowed by para. 15 of the Board's decision of 15 July 1975.

2. The default lies in the failure of the respondent's undertaking given at the Board's first hearing, that the grievor "will be recalled when a fourth person is required for the topping operations or *if she should be found suitable for retraining in another area of the operations*". (emphasis mine)

3. I find, secondly, that the rehiring interview mentioned in para. 14 of this majority decision (about which more needs to be said) and the manner and quality of the supervision of Miss Reynolds following her rehiring to have been clearly discriminatory, offensively oppressive and so creative of a threatening atmosphere as to amount to punishment of this individual for her trade union loyalty.

4. The respondent agreed and the Board directed that "if she should be found suitable for retraining" she would be recalled. Obviously, a trial period is indicated before it is possible to find one suitable for retraining. The respondent evidently found Miss Reynolds suitable, for an increase was given to her sooner than it had been promised when she was rehired. However, suitability must reasonably be measured by the effect of the job on the worker, as well as by the performance of the worker on the job. Miss Reynolds testified at a Board hearing on Thursday, 18 September 1975 as to the adverse effect of the job on her health. *The next day* she gave a week's notice of resignation to Mr. Borsook, the company President. How can the majority in this decision find comfort in their position by saying in para. 15 "However, in advising the respondent that she was leaving, she apparently offered no reasons, nor, more significantly, did she ask whether the respondent intended to take any further steps to meet her specific complaints"? Surely, testimony before the Board on this very point is reason enough.

5. The testimony of Miss Reynolds on 4 November 1975 before this panel of the Board was that Mr. Borsook did not even speak to her when he was advised of her intention to leave in a week. Instead, the same day a letter accepting her resignation was given to her. Does such a callous act by the principal company officer go toward the obligation taken by this company to recall Miss Reynolds "if she should be found suitable for retraining"? And why, after giving her a raise in pay, should the job in question be the only avenue for retraining under these circumstances, in a plant that appears to employ about 150 women?

6. The testimony of Miss Reynolds was given in a reasoned, clear and credible manner. She indicated there were other jobs in the plant she could learn easily, at least one of which, in the stock room, where her command of English would be a definite asset to the employer.

7. That Miss Reynolds terminated her employment under duress does not, in my opinion, relieve the company of its obligation to retrain her. With respect to the meaning and intent of the 15 July order, I note that para. 11 of the majority decision of this panel editorially upgrades that order when referring to it by the expression "*deemed* by the respondent to be suitable for retraining". With respect to my colleagues, "*deemed*" places a construction on the order that I cannot find.

8. The second matter is the very special attention accorded Miss Reynolds upon her return to employment. Contrary to the majority assessment of her evidence expressed in para. 13, I attach much significance to these events. On her first day back she was escorted into the office by her supervisor where she was lectured by the company President in the presence of the Plant Manager, her supervisor and a payroll clerk. Mr. Borsook informed her of her pay and the line of command. He told her not to walk around the plant or talk during working hours. When reminded that it had not been that way before, he said the policy was changed. The witness also testified that she was not called in and told the rules when she was first hired in April 1973.

In cross-examination on this point the witness testified that Mr. Borsook said with emphasis "*you don't wander around*". She also made reference in cross-examination to a notice posted in this regard on the same day. There had been no previous similar notice to employees, she said, and the intent of the notice was to make the specific restriction on her movement appear non-discriminatory.

The interview was the first time Miss Reynolds had met Mr. Borsook. After this encounter, she was escorted back to her new job. In the following weeks Mr. Borsook came to her on the job a number of times and asked how fast she was producing.

9. Mary Bruni, the immediate new job supervisor of Miss Reynolds, was very attentive and quite friendly. She asked "why don't you quit and go to school?", and suggested, apparently in the alternative, "keep your mouth shut and get a job upstairs". Miss Reynolds said she talked to people about the union after returning to work, and came to Board hearings. Mary Bruni asked her why she supported the union, and expressed herself as being against the union. She remembered Miss Reynolds from when she passed out leaflets in front of the plant when she first worked there.

10. The respondent called Tina Vallante, the previous occupant of the Reynolds' job for 10 years up to July 1975. Asked how she came to be transferred to her present job from the "second blocking" job, she testified in cross-examination, "I know how to do it – they brought me to it". She had asked Maria Bruni many times to be transferred, but they had to find another girl – and also asked Mrs. Vallante to find a replacement. However, in the whole plant there evidently was no one who wanted the job and Mrs. Vallante could find no one to take her place. Considering the testimony of Miss Reynolds in describing this job, that it went begging is readily appreciated. The work station was in a corner facing a wall, feeding a steaming machine, exposed to dye house smells and chemical fumes and condensate dripping from the ceiling. A fan, intended to exhaust the fumes and steam, made so much noise that other workers turn it off and it therefore operated infrequently.

My assessment of the testimony of this witness, taken through an interpreter, is that it supports the complainant's case.

11. In arriving at my decision, I have read the earlier endorsements of the panel first seized of the matter. However, it is on the evidence I heard on 4 November that I find default and discrimination, as stated earlier.

I therefore direct that Randi Reynolds be offered employment by the respondent as required by the spirit and meaning of the 15 July 1975 order of the Board, and that she be considered and offered all job opportunities that may become available from time to time as employees are required, until a job is accepted by Miss Reynolds.

I would leave the matter of compensation for settlement by agreement between the complainant and the respondent.

0756-75-R Warehousemen and Miscellaneous Drivers Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Applicant) v. **Provincial Fruit Company (Ottawa) Limited**, (Respondent).

BEFORE: R.A. Furness, Vice-Chairman, and Board Members F.W. Murray and H. Simon.

APPEARANCES: *I.J. Thomson and G. Beaulieu appearing for the applicant; S.C. Bernardo and Steve Ewachow appearing for the respondent.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN AND BOARD MEMBER H.SIMON: November 21, 1975.

2. This is an application under section 55 of The Labour Relations Act with respect to the bargaining rights of the applicant as a result of an alleged sale of a business by Leamington Vegetable Growers Co-operative Limited operating as G. Smith Produce Company (hereinafter referred to as "Smith") to the respondent. This sale allegedly occurred on or about June 2, 1975. The applicant takes the position that as a result the respondent is re-

quired to bargain with it with a view to making a collective agreement. The applicant further alleges that a change in the character of the business has not taken place and that an intermingling of employees of one business with employees of another business represented by a trade union has taken place.

3. In its reply the respondent stated that the applicant was not entitled to the relief it requested because a sale of a business did not take place and denied that there had been an intermingling of employees.

4. The respondent adduced the relevant evidence before the Board and the facts are not in dispute.

5. The applicant was certified by the Board on June 25, 1974, with respect to Smith. The bargaining unit was defined in terms of "all employees of [Smith] at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff". The applicant and Smith did not sign a collective agreement. On July 17, 1975, the applicant sent a registered letter to the respondent. In this letter the applicant stated:

Please accept this as our notice to bargain for and negotiate a collective agreement. This notice is given to you under section 55 of The Ontario Labour Relations Act.

Please advise us as to a date which will be convenient to meet.

6. The respondent replied that they did not feel they had to negotiate and on August 14, 1975, the applicant filed this application.

7. The respondent and Smith have no corporate affiliation. In the transaction between the respondent and Smith, only one thing mattered as far as the respondent was concerned; and that was the acquiring of floor space at the Ontario Food Terminal in Toronto so that it could operate its business which had been previously based in Ottawa.

8. Negotiations between the respondent and Smith began in May of 1975 and on June 16, 1975, the transaction between them was concluded. Counsel for the respondent informed the Board that in order to carry on a business of distributing fruit and fresh produce in Metropolitan Toronto it is necessary to have floor space at the Ontario Food Terminal. Although counsel did not elaborate on this point, he was presumably referring to sections 5 and 12 of *The Ontario Food Terminal Act*, R.S.O. 1970, c. 313, as amended. Sections 5 and 12 read as follows:

5. The Board may rent space in the Terminal to such persons and upon such terms as the Board considers proper and may make such arrangement and enter into such agreement with any such person it considers advisable in the circumstances.

12. (1) No person shall establish or operate within the Municipality of Metropolitan Toronto, Regional Municipality of York or County of Peel any market for the sale by wholesale of fruit and vegetables except with the approval of the Board, but this section does not apply to any

such market that was being regularly and continuously operated as of the 1st day of April, 1955, so long as it is not extended or enlarged.

(2) In subsection 1, the expression "any market for the sale by wholesale of fruit and vegetables" includes any premises at which fruit or vegetables are purchased for resale.

9. The respondent paid to Smith on closing the transaction the sum of approximately \$500,000. Of this amount \$475,000 was paid in consideration of the assignment of the lease which Smith held at the Ontario Food Terminal with the Ontario Food Terminal. This lease expires in 1983 and the sum of \$475,000 represents several times the total rent which is payable under the lease. The sum of \$1,000 was paid by the respondent to Smith for produce still held by Smith on the date of closing. The sum of \$5,000 was paid by the respondent to Smith for certain hardware such as baskets, pallets, and a fork-lift truck which was located in the premises which are covered by the lease including certain leasehold improvements, conveyors and coolers. It appears that the balance of approximately \$20,000 was paid by the respondent to Smith with respect to certain items listed in a bill of sale. This bill of sale is also dated in June of 1975. These items include a potato bagger, hand jacks, office equipment and three trucks. Most of these items have subsequently been disposed of by the respondent. In obtaining the assignment of the lease, the respondent acquired the exclusive right to three stalls and three shipping doors at the terminal and the right to use certain common elements which are used by other tenants, such as common dock space and cold storage areas.

10. There was no sale of goodwill of Smith's business to the respondent and there was no assignment of Smith's accounts receivables, if any, to the respondent. Smith operated at full capacity until Friday, May 30, 1975. Some time in May of 1975, Bruce Smith who was the manager of Smith and his assistant, Lloyd McKinnon, purchased Lenson Celery Limited which had a similar space at the Ontario Food Terminal about one hundred and fifty feet along the dock. On Monday, June 2, 1975, Messrs. Smith and McKinnon and sixteen of the twenty one employees formerly employed by Smith commenced operations as Lenson Celery Limited. Prior to the change by the management and staff of Smith to Lenson Celery Limited, Bruce Smith sent a letter to each of Smith's suppliers in which he indicated that he and Lloyd McKinnon were purchasing Lenson Celery Limited and that they hoped that these suppliers would continue to do business with them at their new location. These suppliers, who number about two hundred, complied with the expectations of Messrs. Smith and McKinnon and are currently supplying produce to Lenson Celery Limited. While the transaction between Smith and the respondent was closed on June 16, 1975, the respondent did not use its floor space for about a week. During this week the respondent erected its signs and made changes which reflected its mode of operations.

11. The respondent's business may be divided into two parts. Ninety to ninety five per cent of its business consists of importing from the United States citrus fruits, out-of-season grapes, plums, nectarines and vegetables. Five to ten per cent of its business consists of locally grown fruit and vegetables. The purchases from the United States are made in that country and are shipped by the respondent in bulk lots to its premises at the Ontario Food Terminal.

12. Smith's former business was primarily confined to fruit and vegetables which are grown in Ontario. A small proportion of its former business consisted of fruit and vegetables grown elsewhere in Canada. Smith handled practically nothing from outside Canada.

13. Five of Smith's employees, including a sales representative became employees of the respondent and were on the respondent's payroll from June 16, 1975. There was no break in their employment. They became employees of the respondent upon ceasing to be employees of Smith. Approximately sixteen of Smith's former employees became employees of Lenson Celery Limited. The respondent which, prior to the transaction with Smith, operated its business in Ottawa, brought some of its employees from Ottawa to work in the Ontario Food Terminal in Toronto and they worked together with the former employees of Smith who became employees of the respondent. At the time of the hearing the respondent employed about ten persons who would be included in a bargaining unit which would be analogous to the bargaining unit which was referred to in paragraph 5 herein.

14. The respondent argued that there was not a sale of a business between Smith and itself within the meaning of section 55. The respondent characterized the transaction as merely the assignment of a lease in which the Ontario Food Terminal had concurred. In addition, the respondent argued that there was no magic in being in any particular location in the terminal and that the respondent had merely acquired the use of certain space within the terminal. The respondent stressed that while its transaction with Smith was closed on June 16, 1975, as of June 2, 1975, the entire business of Smith was being carried out by Lenson Celery Limited, one hundred and fifty feet away with the same management, the same suppliers and substantially the same employees. The respondent pointed to the active and successful campaign by Messrs. Smith and McKinnon to take its suppliers to Lenson Celery Limited. Therefore, the respondent argued, Smith had no business to sell as of June 16, 1975, and that the key to the respondent's business is its suppliers which had been attracted to Lenson Celery Limited. Counsel for the respondent cited the following decisions of the Board: the *Sunnybrook Food Market (Keele) Limited* case [1974] OLRB Rep. 47; the *Winco Steak N' Burger Restaurants Limited* case [1974] OLRB Rep. 788 and the *Zehr's Markets Limited* case [1974] OLRB Rep. 331.

15. The applicant characterized the transaction between Smith and the respondent as a sale of a business within the meaning of section 55 and argued that merely because the respondent did not obtain all the advantages it expected to obtain this was not the fault of this Board. The applicant pointed to the intermingling of employees and argued that the changes in staff and the percentages of former employees of Smith who are presently employed by the respondent are irrelevant.

16. The evidence before the Board establishes that Smith disposed of all its physical assets to the respondent. Simultaneously Smith, with the agreement of the Ontario Food Terminal, assigned its lease in its premises at the Terminal to the respondent. There was no real interruption between the business operated by Smith and the business operated by the respondent. There was an intermingling between the employees of the respondent from Ottawa and the former employees of Smith who became employees of the respondent.

17. In our view the respondent is and Smith was engaged in businesses that are not substantially different as contemplated by section 55(5) of The Labour Relations Act. Their two businesses are essentially the same in that both are or were engaged in the sale by

wholesale of fruit and vegetables. The type of fruit and vegetable and the point of origin of such produce is not such a difference so as to support a finding that section 55(5) is relevant to this application.

18. The respondent relied on the fact that there was no sale of goodwill of Smith's business and no assignment of Smith's receivables. In addition, there was no purchase by the respondent of lists of Smith's customers. Indeed, it appears that Bruce Smith invited the suppliers of Smith to do business with Lenson Celery Limited. As the Board stated in the *Winco Steak N' Burger Restaurants Limited* case, *supra*, the presence or absence of goodwill in a transaction is not decisive. In the circumstances of this application, it is hard to imagine any goodwill which would be of value to the respondent. The same is true of lists of customers. The concept of goodwill is nothing more than an expectation that customers will habitually return to the same place of business for their supplies or services. The respondent deals and Smith dealt in a different line of produce within the businesses of the sale by wholesale of fruit and vegetables. It therefore seems unlikely that Smith's former customers would or could look to the respondent to satisfy their requirements. Similarly, the suppliers who supplied Smith and who are now said to supply Lenson Celery Limited would not be able to satisfy the business requirements of the respondent. There was no evidence to indicate that Smith had any accounts receivable.

19. In our opinion, the most important single element in the transaction between the respondent and Smith is the assignment of the lease. The respondent paid several times the total rent which is payable under the lease. Moreover, counsel for the respondent admitted that in the transaction with Smith only one thing mattered as far as the respondent was concerned, and that was the acquiring of floor space at the Terminal so that the respondent could operate its business which had been previously based in Ottawa.

20. Counsel for the respondent asserts that it is necessary for the respondent to have floor space at the Ontario Food Terminal in order to carry on its business in Metropolitan Toronto. This assertion appears not to be inconsistent with the provision of *The Ontario Food Terminal Act*, R.S.O. 1970, c. 313, as amended. The respondent purchased all of the physical assets of Smith including Smith's lease at the Terminal. In the *Sunnybrook Food Market (Keele) Limited* case, *supra*, the Board declined to agree with the proposition that in the retail food market business the location of the premises *per se* is a significant factor in considering the sale of a business. Subsequently, in the *Zehr's Markets Limited* case, *supra*, the Board in *obiter dictum* stated that in the retail food market business the location of the premises *per se* is a significant factor in considering the question of a sale of a business. However, in the instant application, the Board concludes that having regard to the assertion by counsel for the respondent and to the provisions of *The Ontario Food Terminal Act*, R.S.O. 19 c. 313, as amended; that by virtue of purchasing the assignment of a lease for a substantial consideration together with all of the physical assets of Smith, the respondent has purchased business premises which constitute the purchase of a business from Smith. The fact that the manager of Smith has entered into a further transaction with respect to Lenson Celery Limited does not diminish the essence of the Transaction between the respondent and Smith.

21. The Board finds that the respondent has purchased a business from Smith within the meaning of section 55 of The Labour Relations Act. The applicant was certified with respect to Smith and gave or was entitled to give notice under section 13 of The Labour Relations Act to Smith. Smith sold its business to the respondent and the applicant continues to

be the bargaining agent for the employees of the respondent in the like bargaining unit referred to in paragraph 5 herein. The applicant has already given written notice of its desire to bargain with a view to making a collective agreement. Such notice has the same effect as notice under section 13 of The Labour Relations Act.

1083-75-U Retail Clerks International Association, (Complainant) v. G.Tamblyn Ltd., (Respondent).

BEFORE: K.M. Burkett, Vice-Chairman, and Board Members J.D. Bell and A. Gribbin.

APPEARANCES: *Ted Wohl and Rick Sjoerds for the applicant; R. Ross Dunsmore and John Marcinko for the respondent.*

DECISION OF VICE-CHAIRMAN K. M. BURKETT AND BOARD MEMBER A. GRIBBIN: November 21, 1975

1. This is a complaint under Section 79 of the Act in which the complainant alleges that the grievor has been dealt with by the respondent contrary to the provisions of Sections 56, 58 and 61 of the Labour Relations Act.

2. The complainant agreed, in response to a concern with respect to particulars raised by the respondent at the outset of the proceedings that the complaint relates only to the termination of Mr. J. Narang as an alleged violation of sections 56, 58 and 61 of the Act.

3. The respondent company called two witnesses to give evidence as to circumstances precipitating the discharge of Mr. J. Narang. The first of these was Mr. John Stout a licensed pharmacist who holds the position of Vice-President of Pharmacy operations with the respondent company. He has held that position for one year. He testified to the fact that the Sayvette outlet where Mr. Narang had been employed as manager was closed by Sayvette effective July 1, 1975, as were two other Sayvette locations. These closings affected the employment status of 6 persons. These six persons were offered permanent positions outside the Toronto area or "float" positions within the Toronto area at the same salary. Mr. Stout testified that of the six affected, one person accepted an out of town appointment, another is working in a "free standing" store at reduced hours, a third voluntarily resigned, a fourth took pregnancy leave, a fifth Mr. Boghossian, was terminated at the end of the summer when there was no further need for "floating" relief and finally Mr. Narang was terminated as well when the "float" position "worked itself out."

4. Mr. Stout identified a document (Exhibit #1) as setting out the store locations and hours of work of Mr. J. Narang from the week ending June 30 to the week ending September 13, 1975. Attention was drawn to the last three weeks listed which show Mr. Narang working in Store #91. The witness stated that the first two weeks he performed vacation relief and for the last week he was relieving for a Mr. McKoy who had been transferred to the Trenton outlet. A second document was identified (Exhibit #2) purporting to show the hours of work and store locations of others in the "float" classification. Mr. Stout qual-

ified the document in cross examination by referring to it as "representative" of the hours and locations of those in the "floater" classification. The evidence was that of the 5 persons referred to in the document only two continue in the "floater" classification in the atypical role of province wide floaters. The document is of limited value to the Board because it is not all inclusive but as stated by Mr. Stout, it is representative. Mr. Stout testified that he hired Mr. J. Gerstein in mid August as pharmacy supervisor replacing Mr. J. Davies who had been Mr. Narang's supervisor. He asserted that Mr. Gerstein was free to "hire and fire" within his territory which encompassed the eastern section of Metropolitan Toronto. He stated that at no time did he discuss with Mr. Gerstein the union involvement of Mr. Narang because he was not aware of it. He testified that he had called a meeting in mid June, attended by Mr. Narang at which he handed out material forwarded to him by the Ontario Labour Relations Board and asked that it be posted in the various stores and that nothing else was said about the union.

5. Mr. Stout testified that he became aware of a union meeting for pharmacists to be held at the Yorkdale Holiday Inn in the evening of June 30, 1975, and that in view of the open invitation to pharmacists he decided to attend. He did so with Mr. Davies and a Ms. Zimmerman. When asked to leave all three proceeded to the bar where they ordered dinner and remained for some time.

6. In cross examination the relationship of Mr. Gerstein to his superior Mr. Stout was somewhat clarified. Mr. Stout testified that Mr. Gerstein reported and answered directly to him but that he had the unilateral right to hire and fire. He said that area supervisors had discharged employees in the past but that he, Mr. Stout, had the authority "to overrule". He acknowledged however, that his supervisors come to him before instituting salary increases or promotions. He testified that he did not think it strange that Mr. Gerstein having been employed by the company for only one month would fire Mr. Narang without prior consultation. He acknowledged that he personally had not received any complaints about the work of Mr. Narang prior to his discharge but was briefed by Mr. Gerstein after the fact. He also acknowledged that Tamblyn has hired fulltime pharmacists since Mr. Narang was dismissed. In answer to a question as to the reasons why he and his two colleagues attended the union meeting of June 30, 1975, Mr. Stout replied, "to see if we could go."

7. The second witness to appear on behalf of the respondent company was Mr. J. Gerstein who had joined the company in mid August as a pharmacy supervisor replacing Mr. Davies. He testified that he observed Mr. Narang about once a week from the time he joined the company in mid August until he discharged him in mid September. He observed him firstly in Store #71, a store which fills 950 prescriptions a week and requires both a technician and a part-time girl to assist the pharmacist. Mr. Gerstein testified that from his personal observations, Mr. Narang was "away over his head" in that he was taking too long to fill prescriptions and was untidy. Mr. Gerstein said that he checked his assessment with a Mr. Trehen, a supervisor in charge of the non-pharmacy section of the store. Mr. Gerstein also observed Mr. Narang at work in Store #91, a store which fills 450 to 500 prescriptions per week and which does 25 per cent "third party" business. No one is employed to assist the pharmacist in Store #91. Mr. Gerstein testified that for the three weeks Mr. Narang was assigned to Store #91 the company had to use "estimated" figures in order to make its week-end accounting entries because the necessary paper work had not been completed. He did not, however, formally warn Mr. Narang or put him on notice but rather mentioned the

situation and helped behind the counter. Mr. Gerstein further testified that when he filled the permanent position in Store #91, left vacant by Mr. McKoy's transfer to Trenton he did so with a Mr. Goodman whom he judged, on the basis of personal interview, to be more competent than Mr. Narang who he had decided on the basis of his observations to be incompetent. He testified that someone of Mr. Goodman's competency was needed to complement the pharmacy manager of store #91, who was an older man, slow to the point of having to put in long hours to keep up.

8. Mr. Gerstein testified that he terminated both Mr. Boghassian and Mr. Narang without prior discussion with his supervisor, or any inquiry as to the need for these persons elsewhere in the company, and that he had no knowledge of Mr. Narang's membership in the union, not having discussed the union with either Mr. Davies his predecessor or Mr. Stout his immediate supervisor.

9. In cross examination Mr. Gerstein stated that he works with all his pharmacists when he inspects and that he assisted Mr. Narang on one occasion in store #71. He stated that exclusive of the date of discharge he witnessed Mr. Narang at work in store #91 on two occasions. He acknowledged that he could only assess direct responsibility to Mr. Narang for the unfinished paper work at store #91 for those weeks during which he was scheduled to work on a Saturday. Mr. Narang, therefore, might only have been directly responsible for the failure to complete the required work on one occasion. He did not undertake to determine precisely which weeks Mr. Narang was scheduled on Saturday nor did he discuss the matter with the Pharmacy Manager, Mr. Vince, who worked the off-shift to Mr. Narang and shared in the paper work and therefore would have been affected by Mr. Narang's alleged incompetence.

10. Mr. J. C. Narang appeared before the Board to give evidence on his own behalf. He is a licensed pharmacist hired by the company on June 1, 1974, first assigned to store #10 (although in cross examination it was brought out that he spent his first two weeks at store #7) who was subsequently promoted to pharmacy manager at the Sayvette Thorncliffe outlet where he served until that outlet was closed on June 28, 1975. He testified that at that time he was told by Mr. J. Davies his supervisor that he would be assigned to another store but that first he would be helping to remove the stock from the Sayvette outlet.

11. Mr. Narang testified that he attended the union meeting at the Holiday Inn, Yorkdale, on June 30, 1975, and in direct contradiction to Mr. Stout's testimony he stated that he said "hello" to Mr. Stout, Mr. Davies and Ms. Zimmerman and that Mr. Stout said hello to him, and that he later encountered these three persons in the lobby after the meeting and again after that in the bar. Mr. Narang testified that three or four days later, Mr. Davies who was then his supervisor asked him if he was a member of the union and said to him that the union would not help him. Mr. Davies repeated these remarks on two or three other occasions.

12. Mr. Narang testified that he first saw Mr. Gerstein the new pharmacy supervisor on Friday, August 29, 1975, when he came into store #91 with Mr. Stout. He said that he had never seen Mr. Gerstein in store #71 and that Mr. Gerstein had never helped him with prescriptions in that store. This testimony is in direct conflict with that of Mr. Gerstein. Mr. Narang further testified that he first met Mr. Gerstein in the capacity of supervisor on September 18, 1975, when Mr. Gerstein came to store #91, and terminated him (or allowed

him to take vacation depending on whose evidence is to be believed). This testimony is also in direct conflict with that of Mr. Gerstein.

13. Mr. Narang related the events leading up to his discharge as follows: He phoned Mr. Gerstein on Friday, September 5, while working in store #91 in order to check his schedule for the following week. He stated that Mr. Gerstein asked him to fill in at the Whitby Store commencing the following Tuesday, and promised that from Monday September 15, onward he would be placed in store #91. On Monday, September 8, Mr. Stout called store #91 to inquire as to who was assisting Mr. Vince the pharmacy manager in the absence of Mr. McKoy who had departed for Trenton. Mr. Stout told Mr. Narang to disregard Mr. Gerstein instructions and remain at store #91 rather than go to the Whitby store. Mr. Stout said that he would inform Mr. Gerstein of the change. Mr. Narang testified that on Tuesday September 9, Mr. Gerstein called and informed Mr. Narang that he would be assigned to store #91. Mr. Narang then testified that on Thursday, September 18, Mr. Gerstein visited store #91 about 1 p.m., when he was coming on duty, and in Mr. Narang's understanding told him to commence his vacation and as an aside told him that he was a slow pharmacist. Mr. Narang testified that he did not discover that he had been terminated until October 3, 1975, when he returned from vacation to find terminating documents which had been mailed from the company on October 2, 1975.

14. Mr. Narang was unshaken on the material facts of his testimony during cross examination with the exception of his agreeing that he did not get clarification from Mr. Stout on September 8 with respect to whether his continuation at store #91 was to be as a "floaters" or by permanent appointment. He admitted that the last time John Davies had discussed the union with him was during the first week in August. He also admitted that other than one attempt to call Mr. Gerstein he did not pursue his termination with the company because in his words he is an "optimist" and felt confident that he could get alternate employment.

15. Mr. Dunsmore, appearing on behalf of the respondent acknowledged that pursuant to section 79(4) of the Act the employer bears the burden of proof which he stated is to prove on the balance of probabilities that the reasons given for the discharge were the only reasons and that they are without anti union animus. He referred firstly to the Sayvette closure and argued that the treatment afforded Mr. Narang was no different than that afforded any of the other six persons who were affected. Mr. Dunsmore argued strongly that the Board must weigh heavily the question of timing and be influenced by the fact that even accepting the evidence of Mr. Narang that he had been seen by Mr. Stout at the union meeting of June 30, 1975, that it was not until September 18, 1975, that the discharge occurred. He cited a number of Board cases in support of the proposition that the time frame is a critical consideration in these matters; the proximity between the employers first learning of union activity or support and the alleged offence. He argued that the ten week time lag between the date of the union meeting and the discharge weaken if not destroy the link between the two if there ever was one in the first place. With respect to the anti union comments directed at Mr. Narang by Mr. Davies, Mr. Dunsmore again referred to the passage of time and to the evidence of Mr. Stout and Mr. Gerstein that Mr. Davies had never discussed Mr. Narang's union involvement with them. Mr. Dunsmore asserted that this fact would make Mr. Narang's evidence irrelevant to a determination of the point at issue. Mr. Dunsmore stated that Mr. Gerstein's assessment of Mr. Narang's capabilities led to his discharge as it did with Mr. Boghassian. He referred the Board to the *Bushnell* case as support-

ing the proposition that motivation is a prime factor in cases such as these and reminded the Board that Mr. Gerstein had no knowledge of Mr. Narang's union activity and therefore could not be motivated by it. And finally, with regard to the credibility of Mr. Narang he asked the Board to compare on the one hand the evidence of Mr. Narang that he was told to go on vacation on September 18, and that he did not realize he was terminated until October 3, with the evidence of Mr. Gerstein on the other hand that he had terminated Mr. Narang made no real effort to contact the company on October 3 or thereafter. This behaviour, he argued, would be in keeping with the actions of someone who had had the opportunity to discuss the termination on September 18.

16. Mr. T. Wohl appearing for the complainant argued firstly that Mr. Stout the respondent company's Vice-President was at the union meeting of June 30 because he wanted to investigate and that he saw the complainant at that meeting and after. He stated that Mr. Davies who was at the union meeting as well knew Mr. Narang was a union member and had cautioned him in this regard. He drew the Board's attention to the fact that Mr. Narang had been promoted six months previous to the termination and to the fact that there was no written separation notice. With respect to Mr. Boghassian he stated that there was no evidence before the Board with regard to the circumstances surrounding that termination. He painted a scenario which saw Mr. Stout, who had knowledge of Mr. Narang's union involvement, overruling Mr. Gerstein who had appointed Mr. Narang to store #91 on a permanent basis on September 9, and ordering him to terminate Mr. Narang. He concluded his representations by stating that in large measure this matter would turn on credibility and that Mr. Narang had not been shaken in cross examination and that his evidence should be believed.

17. Section 79(4a) of the Act states:

"On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.
1975, c.76, s.21(1)".

18. In considering the question of onus the Board refers to the recent *Barrie Examiner* case, Board file No. 0597-75-U dated October 6, 1975, as yet unreported, where it is stated in paragraph 17:

"Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. *Both elements must be established* on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred." (Emphasis added)
See also *Fielding Lumber case*, Board file #0503-75-U dated September 9, 1975, as yet unreported.

19. The Board has been very clear in the past in asserting that if the decision of an employer to discharge is in any way motivated by anti-union considerations, the discharge is a contravention of the Act. See *Delhi Metal Products* case (1974) OLRB. M.R. July at page 450 and the cases cited therein. The respondent therefore must establish on the balance of probabilities a credible explanation for the discharge which is free from any taint of anti-union motive.

20. Having regard to all of the evidence before it, and to the Board's assessment of the credibility of the witnesses the Board finds that the respondent has failed to prove on the balance of probabilities that the termination of Mr. J. Narang was not at least in part motivated by anti-union sentiment, contrary to section 58(a) of the Act. The Board is faced with conflicting testimony with respect to the union meeting of June 30, 1975. Mr. Stout testified that he did not see Mr. Narang and therefore did not know that he was a union supporter whereas Mr. Narang testified that the two exchanged pleasantries. The Board is compelled to state that Mr. Stout's appearance at the union meeting was at best a serious error in judgement on his part and that the explanation he offered to explain his presence was weak and unconvincing. The Board is left with a serious question as to the motive of Mr. Stout in attending that meeting and remaining on the premises until it had been completed.

21. Notwithstanding Mr. Stout's motivation in attending the June 30 union meeting the respondent's case turns on the testimony Mr. J. Gerstein that he acted alone and without prior consultation with Mr. Stout in terminating Mr. Narang. The Board has difficulty accepting that a person in the employ of the company for little more than one month would unilaterally and without any prior discussion with his superior terminate a qualified pharmacist. Mr. Stout's September 8th countermanding of Mr. Gerstein's work assignment, (Mr. Narang to the Whitby store) does not support Mr. Gerstein's claim of complete autonomy. In addition the Board has difficulty with the testimony of Mr. Gerstein with respect to the fact that at no time did Mr. Stout discuss with him the activity of the union. Mr. Stout had sufficient interest in the union to attend one of its meetings and furthermore, the union organization of pharmacists is a very recent development and certainly one of some import to the respondent company. Mr. Gerstein is asking the Board to believe that Mr. Stout did not at least advise him of the union's ongoing efforts to acquire bargaining rights on behalf of the respondent's pharmacists. Mr. Stout in briefing his newly hired pharmacy supervisor would have been remiss not to have so advised him.

22. Turning to the explanation for termination put forward by the company the Board is faced with testimony which conflicts on all material facts. In essence Mr. Gerstein testified that he personally evaluated Mr. Narang on three separate occasions whereas Mr. Narang testified that he did not. The Board acknowledges that Mr. Narang's testimony lacked credibility with respect to the date of his termination. However, having found that Mr. Gerstein's testimony lacked credibility with respect to the matters referred to in the preceding paragraph and in the absence of any corroboration, (See *Petite Originals* (1975) OLRB M.R. August, at page 650) the Board is not prepared to accept Mr. Gerstein's testimony in preference to that of Mr. Narang. The only other evidence which the Board has before it which would reflect on the work performed of Mr. Narang is his failure to complete required paper work on a minimum of one occasion. Even this evidence is somewhat qualified by the fact that during the week(s) when Mr. Narang did not complete his paperwork he was working with a pharmacy manager, who was, by the account of Mr. Gerstein, very slow. This evidence is hardly sufficient to support a credible explanation for the termination

in the face of Mr. Narang's promotion and increase in salary six months previous and the lack of any other complaint about his work.

23. The respondent argued that Mr. Narang was treated no differently than the other employees affected by the Sayvette's closure. The explanation put forward by the respondent however was based solely on the incompetency of Mr. Narang as assessed by Mr. Gerstein. His evidence was that having made this assessment he acted unilaterally and did not check to ascertain if Mr. Narang's services were required elsewhere within the company. He testified that if Mr. Narang "was not competent for me he would not be competent elsewhere". He did not rely on the Sayvette closure as necessitating a lay-off or termination, but rather admitted to hiring pharmacists subsequent to the discharge of Mr. Narang. The treatment of the other employees affected by the Sayvette closure as compared to the treatment of Mr. Narang is irrelevant therefore to the Board's deliberations with respect to the explanation put forward in defence of the respondent's action.

24. Turning to the respondent's representations with respect to the timing of the termination and the inferences which it asks be drawn in support of its contention that the termination was free from anti-union motive; the timing of the discharge relative to the employers first knowledge of union activity or involvement is only one factor, albeit an important one which enters into the ultimate determination. (See the *National Automatic Vending Co.* case 63 CLLC 16, 278 at page 1162 where the factors considered by the Board in these matters are catalogued.) Timing is particularly important in those instances where anti-union activity follows closely upon the employer's knowledge of pro-union activity as in those decisions cited by Mr. Dunsmore. (See the *Barrie Examiner* case (supra), the *Delhi Metal Products* case (supra) and the *Olympia and York* case, 1973 OLRB. M.R. page 407). In the instant case there is evidence to suggest that Mr. Narang's services were required during the summer vacation period thereby minimizing whatever inference might be drawn from the extended time-frame. The Board refers to the *Fielding Lumber* case, (supra) where the Board in considering the time lapse between certification and the discharge stated at paragraph 21:

"The respondent argued that the trade union had been certified long before June 9th and it therefore had no reason to act for the reasons alleged. However, the respondent did not establish a period quiescence in its labour relations following the issuing of the certificate to the Steelworkers and as we have noted, a collective agreement between the Steelworkers and the respondent has not been consummated."

In this case the respondent has failed to establish a credible explanation thereby leading the Board to infer from this failure and the other evidence before it that the real reason for the discharge which is within the knowledge of the respondent, was at least in part based on anti-union sentiment. Certainly in other situations the extended time frame might well be a decisive factor in satisfying the burden of proof. In this instance, however, it is not.

25. Having regard to all of these circumstances, the Board is not satisfied that the respondent company has discharged the onus of establishing a credible explanation for the termination which is free from anti-union motivation. Accordingly, the Board finds that the respondent violated section 58(a) of the Act and directs that Mr. Narang be reinstated into the employ of the company. The Board will remain seized of this matter in the event the

parties are unable to agree on compensation or in the event of any other difficulty with the terms of the reinstatement.

DECISION OF BOARD MEMBER J.D. BELL:

1. I disagree with the decision of the majority of the Board.
2. This case hinges on the Board's assessment of the credibility of the witnesses who gave evidence.
3. I prefer the evidence given by Mr. Gerstein stating the reasons why he discharged Mr. Narang and how and when he did so. I have difficulty with Mr. Narang's statement that Mr. Gerstein sent him on vacation and then discharged him by letter just before he was due to return. It is strange that Mr. Narang made no effort to contact the respondent for an explanation.
4. I also find the link of Mr. Narang to union activity is very remote. He states he attended a union meeting along with a number of other people on June 30, 1975. Mr. Stout gave evidence that he, with two colleagues attempted to attend this meeting but were asked to leave. He saw several members of his staff there but not Mr. Narang. Mr. Narang on the other hand says he spoke to Mr. Stout at least twice during the course of the evening. This all occurred two and one half months before the discharge and several weeks before Mr. Gerstein joined the company.
5. I find the applicant has failed to link the discharge with any anti-union sentiment on the part of the respondent and that the respondent has met its obligation under Section 79(4a) of the Act.

1117-75-R United Steelworkers of America, (Applicant) v. Mac-Wood Machine Limited, (Respondent) v. Group of Employees (Objectors).

BEFORE: K.M. Burkett, Vice-Chairman, and Board Members P.J. O'Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: *Lorne Ingle and Pat Grasso for the applicant; S.C. Bernardo and Roy Abraham for the respondent; William Van Dommelen and Peter Wientjes for the objectors.*

DECISION OF VICE-CHAIRMAN K.M. BURKETT AND BOARD MEMBER P.J. O'KEEFFE: November 26, 1975.

3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Brampton Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In support of its application the applicant filed evidence of 25 combination application for membership and receipts. The respondent employer filed a "Schedule A" containing the names of 31 employees who are in the unit found to be appropriate for collective bargaining. A comparison of the list of specimen signatures filed by the employer with the membership evidence filed by the applicant reveals that all 25 of the membership applications and receipts are for persons whose names appear on the list of employees submitted by the respondent. In the normal course such membership evidence would be sufficient to entitle the applicant to certification under section 7(2) of the Act. In this case, however, a Statement of Desire in opposition to the application was filed. It contains 14 signatures, 11 of which correspond with persons on whose behalf the union submitted membership evidence. Accordingly, the Board made inquiries into the circumstances surrounding the origination, preparation and circulation of the petition in order to determine if the document represented a voluntary change of heart on the part of the employees who, a short while before, signed applications for membership in the union.

5. Messrs. William Van Dommelen and Peter Wientjes appeared before the Board to give first hand evidence as to the origination and circulation of the petition in order that the Board might make determination as to whether the petition represents a voluntary expression of the employees who signed it. The evidence of Mr. Van Dommelen disclosed that he asked the person whose signature was designated #6 on the petition to pick up the blank petition at the lawyers office sometime before 12 noon on October 27, 1975. Mr. Van Dommelen later found the petition in his truck. Mr. Van Dommelen then gave evidence as to the circumstances in which each of the signatures was affixed to the petition. Finally, he testified that at about 12:30 p.m. on October 23, 1975, employee #6 visited him at home during the lunch hour and offered to deliver the petition to the Board that afternoon. Mr. Van Dommelen gave employee #6 the petition and did not see it again until he identified it at the hearing. Employee #6 did not appear to give testimony. Ms. B. Rak, appearing on behalf of the applicant testified that employee #6 is the son of the owner of the applicant company and brother of the plant manager.

6. The Board places an evidentiary burden upon those who seek to rely on a statement of desire. Form 5, *Notice to Employees of Application For Certification and of Hearing*, which was posted at the respondent company's place of business details certain pre-requisites of form and time which must be met if the Board is to accept a statement of desire. The statements filed with the Board in this matter complied with these pre-requisites. In addition, paragraph 7 of Form 5 clearly outlines the Board requirements with respect to the first hand testimony required in support of a statement of desire in accord with Rule 48(5) of the Board's Rules of Procedure. Paragraph 7 of Form 5 states:

"Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

EXPLANATORY NOTE: Where employees fail to attend in person or by a representative or to testify or produce witnesses to testify as provided in paragraph 7 above, the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant.”

7. The Board stated in the *Formosa Spring Brewery* case, 1974 OLRB. M.R. Oct. at page 6931:

“The Board has interpreted the words origination, preparation and circulation of the petition to be encompassed by and subsumed in the word “circumstances” in terms of its requirement, for direct evidence of the subsistence of the document from the point of its inception to the point of its reception by the Board. This by definition would obviously include first-hand evidence detailing the physical preparation and the actual delivery of the document to the Board.”

See also *Willow Press* case. (1971) OLRB. M.R. Feb. at page 59 and the *Vered and Harvey Limited*, case, (1971) OLRB M.R. at page 1136. The Board places this evidentiary burden upon the objectors so as it will have sufficient first hand evidence to make a determination as to the voluntariness of the petition.

8. In the matter before us there is a gap in the evidence as it relates to the delivery of the document from the lawyers office to Mr. Van Dommelen’s truck and also from the time Mr. Van Dommelen gave the petition to employee #6 until it was delivered to the Board. Mr. S. Bernardo appearing on behalf of the respondent company argued that in view of the fact that there was no evidence of employer involvement or interference in the origination and circulation of the petition that the “hiatus” should not be fatal. He cited in support of this proposition the *Kilgoran Hotels Limited*, case (1975) OLRB. M. R. March, 240, an application for termination of bargaining rights under section 49(2) of the Act. The Board has reviewed that case and has determined that it differs from the matter at hand in that the person who had custody of the petition during the vacation of the person who originated it appeared before the Board to give evidence and be subject to cross examination although her evidence was unsatisfactory as it related to one signature. (See para. 7). In the instant case employee #6 did not appear to give testimony and be subject to cross examination which in light of his custody of the document and his relationship to the owner and plant manager of the respondent company is a fatal omission. In light of the evidence before it, the Board relies on the *Formosa Spring Brewery* case, *Supra*, the *Willow Press* case, *supra*, and the *Vered and Harvey* case, *supra* in preference to the *Kilgoran Hotel* case, *supra*.

9. The objectors have failed to discharge the onus placed upon them and accordingly, the Board can give no weight to the document as casting doubt upon the membership evidence filed by the applicant. This is not to say that the petition is a product of management instigation or involvement. There is no evidence which would support such an inference. However, the voluntariness of the document has not been proven. (See *Phillips Electronics Industries Ltd.* (1974) OLRB. M.R. Nov. 758)

10. Having regard to all of the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time

the application was made, were members of the applicant on October 23, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J.E.C. ROBINSON, Q.C.:

I dissent in part.

While I am in agreement that technically the witnesses called in support of the statement of desire did not completely follow the criteria set forth in the *Formosa Spring Brewery case*, 1974 OLRB, M.R. Oct. at p. 6931, I must also say that from the standpoint of laymen; the requirements set forth in paragraph 7 of Form 5 were complied with.

The witnesses were subjected to a thorough examination concerning the origination, preparation and circulation of the statement of desire and there is, in my opinion, no evidence of management involvement in such documents.

That their true wishes should be frustrated by a technicality contained in the Board's jurisprudence, jurisprudence of which they would have no knowledge, nor access to, and which is not specifically contained in the Board's notice to employees, would seem to deprive such employees of an expression of their desires.

In all of the circumstances, I would have ordered a representation vote among the employees to determine their present desires, or at the very least, would have adjourned the proceedings to allow employee #6 on the statement of desire to attend to give evidence concerning the delivery of the statement of desire to the Board's offices.

0890-75-R Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. **New Ontario Dynamics Limited**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: George W. Adams, Vice-Chairman, and Board Members L. Hemsworth and H. Simon.

APPEARANCES: *L.C. Arnold, R. Brixhe and Y. Desroches for the applicant; Bruce Binning and D. Young for the respondent; Don Marriott, Rubert Campbell, Susie McIntee, Alf Bigelow, Ruby Sweet, Willard Hopkins and Lillian Andrews for the objectors.*

DECISION OF GEORGE W. ADAMS, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON: November 26, 1975.

1. This an application for certification.

2. The applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the Board's practice and the submissions of the parties the Board finds that all employees of the respondent at its plant in Haileybury, save and except foremen, persons above the rank of foreman, quality control, office and sales staff, persons regularly employed for less than 24 hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

The applicant requested the exclusion of those employees employed as truck drivers and based its request on the custom in the industry. The Board examined a number of previous bargaining units granted for sawmill, planing and wood manufacturing enterprises and found no evidence of this custom. (See Board Files 8810-64-R, 7156-63-R, 18783-70-R, 4250-73-R, 4465-73-R, 1104-75-R, 5182-72-R.) The applicant chose to adduce no evidence in this regard and we have refused the request. However, the matter can be raised again by reconsideration if the Board has erred in some material respect.

4. The trade union filed membership evidence on behalf of more than 55 per cent of the employees in the bargaining unit but a document bearing the signatures of 58 persons purporting to be employees of the respondent was filed on or before the terminal date set for this application. Having regard to the overlap in names between this document and the membership evidence the Board undertook its normal inquiry.

5. The first page of the document is signed by its principal proponent – Mr. Alfred Bigelow, an employee of the respondent. And this page reads:

THE LABOUR RELATIONS ACT

STATEMENT OF DESIRE AND OBJECTION TO APPLICATION
BY THE LUMBER AND SAWMILL WORKERS UNION, LOCAL
2995 OF THE UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA FOR CERTIFICATION AS BAR-
GAINING AGENT FOR THE UNIT OF EMPLOYEES AS DE-
FINED IN THE APPLICATION OF NEW ONTARIO DYNAMICS
LIMITED

B E T W E E N:

LUMBER AND SAWMILL WORKERS UNION, LOCAL 2995
OF THE UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

Applicant

A N D:

NEW ONTARIO DYNAMICS LIMITED

Respondent

1. ALFRED BIGELOW, President of an association of the employees of New Ontario Dynamics Limited of Box 1026 New Liskeard, wishes on behalf of himself and his association to object to the certification as applied for.
2. The employees in the Association of New Ontario Dynamic Limited are not in favour of the certification as applied for as evidenced by their signatures on the statement forming part of this statement of desire and objection, all of which signatures were obtained after Friday, the 12th day of September, 1975.
3. There are 122 employees of New Ontario Dynamics Limited of which signatures opposing the application totalling 57 have been obtained.

DATED this 18th day of September, 1975.

[sgd] "Alfred Bigelow"

Alfred Bigelow

ATHLETIC ASSOCIATION

OF NEW ONTARIO DYNAMICS

LIMITED

[sgd]"Alfred Bigelow."

President

Appended to this page are five additional pages containing 58 signatures and a common preamble which reads:

We the undersigned purpose [sic] to form an Athletic Association incorporating the employees of New Ontario Dynamics and DHYM Limited, the association is to have a constitution and charter and will be governed by a duly elected body comprised of a President, Secretary, Treasurer and Executive.

We submit that this Association attain certification designating it as the sole bargaining agent for the companies New Ontario Dynamics Ltd. and DHYM Limited, granting us the right to pursue and obtain a signed workable contract with the aforementioned companies.

6. It was established that intense organizational activity of the applicant occurred during the weekend of Saturday, September 6th. A large number of employees were contacted that weekend by telephone and asked to support the applicant. On Monday, September 8th, the company announced over its loudspeaker system that a meeting of employees would be held that afternoon at 4:00 p.m. during the change of shifts. The meeting was in

fact held for between a half hour to an hour in length and the employees were paid for their attendance. The meeting was convened in the lunchroom and it would appear that all of the employees attended.

7. At the meeting a Mr. Young, who occupies a position on the respondent's board of directors, spoke to the employees and we are satisfied that he had the following to say. He mentioned that an employee had been dismissed on the previous Friday and was now proceeding to stir up problems. He said that rumours of union activity were going around the plant. He said it had come at a bad time because of the financial status of the company. He told the employees that the company had spent three million dollars of borrowed capital for a recent expansion and two of the companies from whom money was obtained were named. It was said that both the companies and the bank were being held off because the company was not making any profit and thus the respondent was being affected by pressure from all sides because of the recent expansion. He then went on to talk about the trade union. He realized employees had a legal right to join a trade union but because of the financial situation it was not a good idea at the time. A trade union was neither good for the employees or the company, he said. He went on to speculate that wherever there is a trade union there inevitably is a strike or, at the very least, greater demands for benefits and wages will be made upon the company. He said at this time the company could not handle such things and could possibly go bankrupt. It was added that many of the men with families could not afford a strike and a lot of good men could be lost.

The next day Young convened another meeting of employees at 10:00 a.m. and told them there continued to be union talk going around the plant and that he wanted to solve the problem. He wanted to know what the problems were and indicated that he was willing to speak with anyone in that regard. And then on Friday, September 12th – the day Form 5 was posted in the plant premises – another short meeting was called where Young announced that he was taking over the personnel relations for the company.

8. After the posting of Form 5 at about 2:30 p.m. Mr. Bigelow left work with the permission of his supervisor, Mr. Andrews, and produced the five pages that form part of the above-mentioned document. He then returned to the plant and distributed the pages to Earl Read, Ruby Sweet and Albert Svekers – fellow employees. We are satisfied that at least Mr. Read solicited signatures for the document on company time and company premises on September 12, 1975. Bigelow, assisted by a few other employees, arranged a meeting at his home to devise a strategy in reaction to the application for certification. Based upon his previous employment experience he was familiar with the concept of a plant based internal trade union formed and administered solely by the employees of a company. He had recently come from a company where such a trade union had been certified by the Labour Relations Board and thus held the bargaining rights for the employees. In explaining the preamble to this document he testified that it was his intention to form a similar organization for the respondent company. In this way he hoped to oppose the application for certification and yet respond to the underlying causes of the application.

9. The Friday evening meeting was devoted to elaborating a strategy by which the association could be formed and a provisional executive was selected. It was also decided to hold a meeting of all employees at the community hall in New Liskeard on Wednesday, September 17, 1975. Bigelow told the Board that he decided to take the following week off work to implement the strategy and called his foreman – Mr. Andrews – Sunday evening to

seek permission. While the exact purpose of the leave was apparently concealed no real explanation would appear to have been demanded by the foreman and we suspect that the actual purpose for the leave was known. Bigelow admitted that he asked two of his foremen if he could solicit signatures on company time and premises and they replied in the negative. He also said that Young approached him on Friday and told him that if he was obtaining signatures on company time and premises he should stop. However, for some mysterious reason he attended at Young's office on Monday to determine "what [he] could do" and Young is said to have told him "it is illegal in the plant" and "not to solicit names while people are working". But notwithstanding this advice he and Ruby Sweet entered the plant at approximately 8:00 p.m. on Tuesday, September 16th, to tell them of the meeting scheduled in the community hall the next day. When they arrived at the lunchroom, Bigelow asked foreman Andrews to leave the room and Andrews obediently absented himself while Bigelow made his announcement.

10. Mrs. Sweet testified that a number of signatures were obtained at this time before another foreman, Mr. Musson, asked them to leave. She told the Board that before obtaining the signatures she told the employees that she and Bigelow were trying to form an association that "would be like a union in the company". While the association would bargain with management it would not cost employees \$8 or \$10 in union dues but rather \$1 or \$2. When Musson inquired what she and Bigelow were doing he was told that they were "forming a union to bargain with the labour board against the union".

11. The meeting on the 17th was held at a community hall in New Liskeard and more signatures were obtained at that time. Bigelow spoke at this meeting. The evidence in this regard satisfies us that Bigelow believed the formation of the association would result in a representation vote between the applicant trade union and the association and that this view was shared with his fellow employees at the meeting.

12. A number of other employees testified in support of the document and it would appear that they too believed that the document tendered as a petition in opposition to the trade union in this case would result in a representation vote between the trade union and the association and that if the association won the vote it would negotiate a contract with the company. In addition, many of these employees testified that they were not frightened by Young's speech. However, regardless of the general merit of such evidence, their responses were, to say the least, ambiguous. For example, Ted Leper stated that he was concerned about the financial position of the company but he was not concerned about his job. And Susan McIntee, who had signed a union card prior to Young's speech and had signed the document apparently after it, stated that what Young said at the meeting "made a good deal of sense".

13. Having reviewed all of the foregoing evidence we must find that the document cannot affect the applicant trade union's right to certification without a representation vote. In cases of this kind a legal onus is upon the objecting employees to place before the Board substantial evidence which casts doubt upon the membership evidence filed. (See *International Harvester Company of Canada Limited* [1969] OLRB Mthly. Rep. June 337; *Green Giant of Canada Limited* [1973] OLRB Mthly. Rep. June 337.) A statement of desire must be a clear expression of opposition to an applicant and, through evidence adduced with respect to its origination and circulation, the Board must be satisfied that a true petition is a *voluntary* expression of opposition. When all the evidence is reviewed in this case

we must conclude that the objectors have failed to satisfy the onus in both these respects. The document is not a clear statement in opposition to the application and, on the balance of probabilities, we are not satisfied that it represents the voluntary wishes of those who signed it.

14. The first page was affixed to the pages bearing the preamble and signatures after the signatures had been obtained and therefore this first page is of no assistance in ascertaining the intention of the employees who placed their signatures on the following pages. Of great importance then is the preamble under which the signatures were placed and this preamble makes no reference to the applicant – be it a positive or a negative reference. Rather, the preamble focuses on the formation of an “Athletic Association” that would apparently obtain both certification and “a signed workable contract...”. Moreover, those persons who drafted and circulated the document believed that it would result in a representation vote between the applicant and the Athletic Association and they shared this opinion with other employees when soliciting the signatures they obtained. However, the Athletic Association lacks a constitution and is without properly elected officers and a properly inducted membership. It therefore is not an organization of employees within the meaning of the Act. For that reason alone it is not entitled to make an application for certification and be placed on the ballot of a representation vote. Therefore even if it can be assumed that the people who signed the document preferred the formation of their own trade union to membership in the applicant it cannot be assumed that they would have changed their minds with respect to membership in the applicant if they had known that the document would not accomplish what its proponents told them it would. Because the document reflects an interest in collective bargaining and expresses no explicit opposition to the applicant it can reasonably be assumed that many employees – particularly those who had previously signed union membership cards – would not have signed the document had they realized that it would result in a representation where the choice would be confined to one between the applicant and no trade union. Moreover, as a general matter, support for one organization cannot be equated necessarily to opposition to all others – as observed in *Village Contractors* [1966] OLRB Mthly. Rep. July 231, where at page 239 the Board wrote:

Thus the evidence establishes in our view that the above 6 objectors did not realize they were signing a document renouncing membership in Local #506; rather all believed (to put the evidence in its most favourable light) that they were signing into Local #1. It is not uncommon for an employee to join more than one union during competing organizational drives but the mere fact of joining a second union does not carry the inference that he thereby does not want the first union. In these circumstances we are not prepared to find that the petitions signed by these 6 objectors weaken any evidence of membership which may have been filed for them by the applicant.

It is therefore for these reasons that we cannot find the signing of such a document consistent only with opposition to the present application and therefore it is dismissed. (See *Ever-Bright Limited Metropolitan Toronto* 57 CLLC 18, 053 for an application of this “consistent only” test to somewhat different facts.)

15. But even if we had not come to this conclusion we are not satisfied that the document represents the voluntary expression of the persons who signed it. A number of salient

facts cause us to make this ruling. First, the origination and circulation of this document were preceded by Mr. Young's very strongly worded speech conveyed to the employees on company time under conditions amounting to a "captive audience" as that term is understood in labour relations. (See *Clark Bros.* case (1946) 90 NLRB 802, and generally, Adell, *Employer "Free Speech" in the United States and Canada* (1966) p.5.) The employees could not avoid hearing Mr. Young's message and the applicant trade union was not afforded equal opportunity to reply. More importantly, the content of the Monday address was not a neutral recitation of fact or a specific response to propaganda emanating from the trade union but an apocalyptic prediction based upon pure speculation. Because of Young's position and the fact that his speculations were tied to job loss and the bankruptcy of the respondent, we find that the speech was capable of unduly influencing employees assembled to listen to it. We emphasize that this was not a reasoned address delivered in the course of a secret ballot representation vote but rather a string of catastrophic predictions followed by the public circulation of a document.

16. We also note that the holding of a meeting prior to the origination of an opposition petition has traditionally been viewed with suspicion by the Board. It is for those in support of the document to satisfy the Board that it represents a voluntary expression of wishes and the Board has often dismissed petitions originating after a meeting of this kind. (See *Bulk-Lift Systems Limited* [1961] OLRB Mthly. Rep. Mar. 431; *Canadian Mouldings Ltd.* [1967] OLRB Mthly. Rep. Nov. 743; *General Markets Limited* 62 CLLC 16, 245; *Travelaine Trailer Manufacturing Ltd.* [1970] OLRB Mthly. Rep. Nov. 829; *Parnell Vending Limited* [1965] OLRB Mthly. Rep. Apr. 5; *Hayes Steel Products* [1964] OLRB Mthly. Rep. Apr. 30.) Because of the delicate nature of the employer/employee relationship described in *Pigott Motors (1961) Limited*, 63 CLLC 16, 264, such meetings convey the anti-union sentiments of the management regardless of their content and, because of this, tend to taint the following efforts of employees who decide to oppose the application. In fact the very formality of holding such meetings demonstrates an employer's concern, and may, in the eyes of other employees, align with management those employees subsequently circulating a petition. And it is a well known principle that the Board will dismiss a petition that has been circulated in circumstances where it would reasonably appear to the employees that those circulating the petition have the support and approval of management. (See *Rubbermaid (Canada) Limited* [1967] OLRB July 336.

17. Further, the document was circulated under other conditions that are likely to have contributed to this perception. For example, Read appears to have freely circulated the document on company time and company premises. Bigelow was given one week's leave of absence without having to give a reasonable justification for his request. Even if his foreman knew nothing of his activities at the time of the request, his purpose must have been clear to everyone in the management of the respondent after he attended at Mr. Young's office on Monday and then at the plant cafeteria on Tuesday evening. Another salient fact in this regard is that when Bigelow and Sweet attended at the plant cafeteria foreman Andrews was asked to leave the room and this he did. In acceding to the request, without questioning either Bigelow's purpose or his right to be in the plant at the time, Andrews clearly gave the appearance that Bigelow's activity was supported by the respondent.

18. When all of these considerations are aggregated, the Board cannot rely on the document in considering the applicant's members evidence and therefore the document is dismissed for these reasons as well. In consequence, the applicant has sufficient membership

evidence to be certified without a representation vote and accordingly the Board need not consider the applicant's submission that it be certified under section 7 *a* of *The Labour Relations Act*. But before concluding this decision by issuing a certificate to the applicant it may be appropriate to outline this panel's understanding of the application of section 7 *a* in a certification application.

19. At the outset of the hearing the respondent submitted that the applicant should have moved under section 79 in order to establish that the legislation had been contravened. It further submitted that while particulars of an alleged violation had been filed, the applicant had failed to specify the sections of the Act which it believed the respondent had violated. With respect to the first submission the Board ruled at the hearing that section 7 *a* should not be construed so narrowly. A separate section 79 complaint ought not to be a prerequisite to the application of section 7 *a* and we could see no purpose for ruling otherwise. In our opinion the Board should be prepared, in the course of an application for certification, to determine whether the Act has been contravened and whether section 7 *a* has application, provided that a respondent is furnished with sufficient particulars of the allegations. To require the separate filing of a section 79 complaint would only make the Board's procedure more complex than it already is and this added complexity would lack any functional purpose. As for the applicant's failure to "plead" a specific section of the Act, we took the position that the Board is obligated to apply any section of the legislation that the evidence reveals has been contravened. (See *Genaire Ltd. and Int'l Ass'n of Machinists and the Ontario Labour Relations Board*, 58 CLLC 15, 388 (Ont. A.C.)

20. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER L. HEMSWORTH;

1. I dissent.

2. I do not believe, on the basis of all the evidence, as I heard it, that a majority of employees now wish to be represented by the applicant.

0335-75-R Canadian Independent Automotive Union, v. (Applicant) **Chrysler Canada Ltd.**, (Respondent) v. Ontario Nurses' Association, (Intervener).

BEFORE: T. E. Armstrong, Q.C., Chairman, and Board Members P. J. O'Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: R. Koskie and M. F. Stoyka for the applicant; R. V. Hicks, Q.C., C. G. Riggs, J.H. McGivney and W. Loebach for the respondent; no one appearing for the intervener.

DECISION OF T.E. ARMSTRONG, Q.C., CHAIRMAN AND BOARD MEMBER P. J. O'KEEFFE: July 3, 1975.

1. This is an application for certification by the "Canadian Independent Automotive Union". The unit sought by the applicant is "all employees of the respondent at its plants in Windsor, Ontario, engaged as general foremen, foremen, save and except supervisors and persons above the rank of supervisor, office and sales staff".

2. The respondent resists the application on three grounds: it alleges that the applicant is not a trade union within the meaning of the Labour Relations Act; that the personnel sought to be represented by the applicant are not employees within the meaning of the *Labour Relations Act*; and, alternatively, that the unit proposed by the applicant is not appropriate.

3. At the hearing on June 16, 1975, counsel agreed that evidence and argument would be restricted to the question of the applicant's status. It was acknowledged, however, that any finding as to status, at this stage of the proceedings, would be contingent on whatever ruling the Board might ultimately make as to the status of general foremen and foremen – the two classifications which the applicant seeks to represent. Counsel for the respondent specifically reserved the right to argue that should the occupants of one or both of these classifications be held to exercise managerial functions within the meaning of section 1(3)(b) of the Act, the applicant could not qualify as an "organization of employees" within the meaning of section 1(1)(n) of the Act. Finally, it was agreed that should the Board determine that the applicant otherwise qualifies as a trade union under the Act, a Labour Relations Officer would be appointed to inquire into and report to the Board on the duties and responsibilities of foremen and general foremen.

4. The applicant has established to our satisfaction that at a founding meeting on April 27, 1975 five employees of the respondent, all foremen, adopted a document entitled "Constitution of the Canadian Independent Automotive Union". The same persons then received and accepted applications for membership from some 134 foremen employed by the respondent. All members, including the five founding members, then ratified and confirmed the constitution and elected officers in accordance with the provisions of the constitution. Since the founding meeting on April 27th there has been one general membership meeting and several executive committee meetings.

5. The constitution includes in its "Purposes" clause (Article III) objectives which cover the regulation of relations between employers and employees. The usual formalities – the approval of a constitution, the admission of persons to membership, the confirmation of the constitution by the admitted members, and the election of officers – have all been followed. However, counsel for the respondent argues that the Board should deny the applicant status for two reasons. First, he contends that the failure of the organizers to advise the general foremen of the founding meeting, and the consequent failure of any general foremen to participate in that meeting, is fatal to the finding that the applicant is a trade union capable of representing foremen and general foremen. Secondly, he contends that the constitution, in defining "employee" to cover any person employed by the company (save those covered by subsisting collective agreements) precludes the applicant from asserting that it is an organization whose membership is limited to employees within the meaning of the Act.

6. As to the first ground of attack, we see nothing in the statutory definition of "trade union" which requires that all classifications eligible for membership be permitted to take part in the formation of the organization. While it might have been preferable – and

certainly more democratic – for general foremen to have been given an opportunity to attend the founding meeting, we would be imposing a test which the Act does not stipulate, either expressly or by implication, if we were to hold that their absence from the founding meeting deprived the applicant of status as a trade union. In rejecting that contention, we do not preclude, of course, any argument as to whether or not general foremen should be included in any bargaining unit found to be appropriate for collective bargaining.

7. The second objection has given us more difficulty. The respondent argues that a trade union is, by definition, an organization of employees; that the definition must be read in a literal and restrictive sense to exclude all non-employees; that the applicant's constitution defines "employees" in the broadest terms to include, potentially, non-employees (i.e., managerial persons of the type referred to in section 1(3) of the Act); and that this potential for non-employees to become members constitutes a fatal defect to the applicant's status as a trade union.

8. Fundamental to the respondent's argument is the proposition that to qualify as a trade union under section 1(1)(n) of the Act, an organization must be able to exhibit that it is comprised solely of employees. Many of the authorities dealing with that concept were canvassed by the Board in the *Ottawa General Hospital* case, [1974] OLRB Rep. 714. The thrust of the submission is that collective bargaining under the Act is premised upon a clear distinction between employers and employees. It would be literally impossible, so the argument goes, for a collective agreement within the meaning of section 1(1)(e) of the Act to be concluded if this distinction is not maintained. Moreover, sections 12, 40 and 56 of the Act, among others, make it abundantly clear that employer participation in the affairs of a trade union is impermissible. The respondent contends, *a fortiori*, that management membership in an organization constitutes a flaw fatal to any finding that the organization is a trade union.

9. Even assuming the correctness of these general propositions (and we need not do so for the purposes of this decision) we are unable to conclude that the mere possibility that non-employees may be admitted to membership is sufficient to destroy the applicant's status as a trade union. The only evidence before us is that only two classifications – foremen and general foremen – have been admitted into membership. Subject to our finding on their status, it cannot therefore be said that non-employees are now, or have ever been, members of the applicant. We are of the view that we must take the applicant as we find it, and that speculative considerations about future membership are not relevant.

10. Alternatively, we do not construe the constitution as applying to persons other than those entitled to bargain under the *Labour Relations Act*. The respondent's contrary contention is based upon Article IV, Section 1 of the constitution which reads:

"*Eligibility* – Membership in the Union shall be open to all Employees of the Company."

and upon the definition of "employee" in Article I, which reads:

"'EMPLOYEE' – means any person employed by the Company, save and except persons covered by subsisting collective bargaining realtionships between the Company and any other trade union."

However, it is necessary to consider these provisions in the context of the entire document. There are several sections of Article III, entitled “purposes”, which support the inference that the constitution is *not* intended to apply to persons other than those entitled to the benefits of the *Labour Relations Act*. For example, section 2 refers to working “through collective bargaining”; section 3 refers to “collective agreements”; and section 7 refers to the union conducting its affairs “in compliance with any applicable laws which have been or may be enacted”. All of these references, in our view, favour the inference that the document was drafted in order to permit “collective bargaining”, leading to “collective agreements”, as those terms are used in the legislation governing private sector bargaining in Ontario: i.e., the *Labour Relations Act*.

11. Even read in isolation, the definition of “employee” in the constitution is equivocal. The respondent contends that it must be construed expansively, to include all persons employed by the company, whether or not they are employees entitled to bargain collectively under the *Labour Relations Act*. However, the wording of the exception clause in the definition, which refers to “persons covered by subsisting collective agreements” implies that the earlier reference to “person” is to any person capable of being (but not now) covered by a collective agreement; otherwise, we would have to attribute two different meanings to the word “person” in the same sentence.

12. We are of the opinion, therefore, that the definition of “employee”, read either in isolation or in the context of the entire document is more susceptible to an interpretation which would limit its application to persons to whom collective bargaining is available at law: i.e., employees within the meaning of the *Labour Relations Act*.

13. The respondent argues that if the constitution permits persons exercising managerial functions to be admitted into membership, then the respondent might unwittingly be a party to an offence under sections 12, 40, 56 or some other provision of the *Labour Relations Act*. Even if we were to adopt the respondent’s construction of the constitution (and we have not done so), it is difficult to see that there is any real likelihood of jeopardy of the sort raised by the respondent. In our view, the prohibitions contained in those sections of the Act ought not to be applied to persons who, while they may exercise managerial functions, are not in fact acting on behalf of management in joining or supporting the union but, rather are pursuing their own economic interests in the mistaken belief that they have the right to organize and bargain collectively under the Act. This notion was expressed in a different but analogous context in the *Air Liquide* case, 64 (3) CLLC ¶16,002. Moreover, there are many instances where management personnel have erroneously been thought to qualify as employees within the meaning of the Act and the Board has declared otherwise in applications under section 95(2). Indeed, the very existence of section 95(2) reflects a recognition by the Legislature that determinations as to employee status may be required, either during bargaining or during the life of the collective agreement, a recognition which, in our view, tends to negate the inference that the mere presence of management personnel within union membership ranks necessarily destroys the union’s status or nullifies the collective agreement to which it is a party.

14. Counsel were unable to refer us to any jurisprudence on this novel point nor were we able to locate any cases in which the issue was argued. Counsel for the respondent, apparently acknowledging that constitutions of many International trade unions, long recognized as trade unions within the meaning of the *Labour Relations Act*, contain no specific

limitations on the status of persons eligible for membership, argued that more stringent tests are required where employees' organizations are formed for the specific purpose of representing employees of a single employer. We see no reason why such a distinction should be made. Nor are we assisted by an analysis of the converse situation, i.e., where the membership eligibility provisions of an applicant's constitution *exclude* persons who are within the bargaining unit found to be appropriate for collective bargaining: see *Gaymer and Oultram*, 54 CLLC ¶17,073. There the considerations are quite different. It would be anomalous to permit an applicant to restrict membership and at the same time enable it, by certification, to conclude a collective agreement requiring union membership as a condition of employment. More generally, it would be undesirable to disenfranchise or exclude from membership persons for whom the union holds exclusive bargaining rights. None of these considerations is applicable in the instant case.

15. For all of the above reasons, we find that there are no preliminary impediments to a finding that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*. This finding, of course, is entirely without prejudice to the respondent's contention that the foremen and general foremen are not employees within the meaning of the *Labour Relations Act*.

16. Mr. D. K. Aynsley, Labour Relations Officer, is authorized to inquire into and report to the Board on the duties and responsibilities of foremen and general foremen.

editor's note:

1. *The dissenting opinion of Board Member J.E.C. Robinson, Q.C., appears at Aug. [1975] OLRB rep. 642.*
2. *An Application for Judicial Review of this decision has been filed with the Divisional Court.*

0185-75-R Canadian Textile & Chemical Union, (Applicant) v. **Canada Carbon and Ribbon Company Limited**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: George W. Adams, Vice-Chairman, and Board Members H.J.F. Ade and E. Boyer.

APPEARANCES: *F.W. Park, Laurell Ritchie and Ray Claridge for the applicant; Gerald L. Flannigan, Fred Wood and Ron Gibbons for the respondent; Gordon R. Fletcher and Mike Farrell for the objectors.*

DECISION OF THE BOARD: October 16, 1975

1. A hearing was scheduled to enable Mike Farrell, an employee of the respondent, to show cause why the Board should inquire further into the matter.

2. By decision dated May 29, 1975 the Board issued a certificate to the applicant for the bargaining unit described therein and in so doing dismissed a statement of desire in opposition to the application, holding that the evidence adduced in its support was insufficient.

3. The principle reasoning of this decision is revealed in the following excerpts:

In the facts at hand, Mr. Mike Farrell, the person designated to represent the opposing employees and one of the prime proponents of the statement of desire, did not attend the Board's hearing. No satisfactory explanation was given to the Board.

According to the evidence of Mr. Gordon Fletcher, the employee who attended the hearing in Mr. Farrell's place, Mr. Farrell attempted to assist a number of employees in withdrawing from the membership of the applicant prior to the application. Thus when the application was made he drafted the statement of desire and Mr. Fletcher typed it. Moreover Mr. Farrell obtained a majority of the signatures on the documents although all but one of these signatures were obtained in Mr. Fletcher's presence.

Finally Mr. Farrell attended a very unusual meeting of employees convened by Mr. Reynolds, the manager of the respondent's plant, in the plant's board room, on company time. This meeting was called the day the "green sheet" was posted and the evidence indicates that Mr. Farrell was the principal speaker against the applicant.

In *Marsh Frozen Foods Limited* [1970] OLRB M.R. Sept. 649 the Board was confronted with very similar facts – where the person who primarily conceived of the statement did not testify – and came to the following conclusion:

In this case the "idea" of the statement of desire was conceived not by Mr. Dupuis but by an employee who failed to testify and accordingly the failure of that employee to testify has resulted in our being unable to assess whether the circumstances surrounding the origination arose as the result of the voluntary wishes of that employee. Further, to accept evidence of this type could result in abuse, in that, an employee improperly influenced could approach another employee and have him take up a statement of desire. We are not prepared, having regard to that evidence and particularly to the fact that the idea did not originate with Mr. Dupuis, to accede the argument and the mechanical process of drawing up the statement and circulating it constitute sufficient evidence or origination to satisfy this Board, and since the person who primarily conceived of the statement did not testify we are not persuaded on the balance of probabilities that the statement of desire is acceptable as casting doubt on the evidence of membership filed. See *Retail, Wholesale and Department Store Union, AFL-CIO; CLC v. Cherney Bros. Limited*, Jan. 1975 OLRB Mthly. Rep., 525; *International Association of Machinists and Aerospace Workers v. International Harvester*

Company Limited v. Group of Employees, July 1969, OLRB Mthly. Rep. 561.

By the same reasoning we have decided that evidence adduced in support of this statement of desire is insufficient. It therefore does not cast a doubt on the membership evidence filed and is dismissed.

4. A request for reconsideration was denied in a subsequent decision of the Board dated June 24, 1975. Following the issuance of this decision the Board received a letter from Mr. Farrell requesting that the Board reconsider and in the following paragraph he explained his non-attendance.

Concerning paragraph 6 Mr. Fletcher could not have given a satisfactory explanation as to where I was because he did not know. However I had phoned the Labour Board on Fri. May 16 and ask to talk to a Miss M. Calarco she was not available but I talked to a Mr. Brunskill. When I related the problem he stated that it was fine that Mr. Fletcher go in my place. As he was also present when the signatures were obtained.

5. Rules 48(4) and 48(5) of the Board's Rules of Procedure (R.R.O. 1970, Reg. 551) read:

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing, or in the case of an application to which sections 63 to 75 apply, at any hearing directed by the Board, in person or by a representative.

(5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the person knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

In every application for certification, by virtue of Rule 4(2), the Registrar of the Board is obligated to send a respondent employer a Notice of Application For Certification And Of Hearing (Form 3) and an appropriate number of notices in Form 5 entitled Notice To Employees Of Application For Certification. Form 3 directs the employer to Post Form 5 immediately "in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the application". In the facts at hand the application for certification was filed with the Board on April 30, 1975 and Form 5 was posted on May 2, 1975. Form 5 notified the employees that a hearing for the application was scheduled on May 29, 1975 and specifically explained to the employees the manner of opposing an application for certification if they so desired. In this latter regard Form 5 reads.

4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. The statement of desire must be,

- (a) received by the Board not later than the terminal date shown in paragraph 3; or
- (b) if it is mailed by registered mail addressed to the Board at its office 400 University Avenue, Toronto 2, Ontario, mailed not later than the terminal date shown in paragraph 3.

6. A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

7. Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.

THE BOARD MAY DISPOSE OF THE APPLICATION WITHOUT CONSIDERING THE STATEMENT OF DESIRE OF ANY PERSON WHO FAILS TO ATTEND.

8. No oral evidence of membership in a trade union, or of objections by employees to certification of the applicant will be accepted by the Board except to identify and substantiate such written evidence.

9. **AND FURTHER TAKE NOTICE** that the hearing of the application by the Board will take Place at its Board Room, 400 University Avenue, Toronto 2, Ontario, on...day, the...day of..., 19..., at...o'clock in the ...noon.

10. **THE PURPOSE OF THE HEARING** is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application referred to in paragraph 1.

11. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

6. In both his letter and subsequent testimony before the Board Mr. Farrell claimed that he called the Labour Relations Board on Friday, May 16, 1975. The Board's Registrar was informed that he could not attend the hearing scheduled for May 20, 1975 but that a Mr. Fletcher was available to do so and Mr. Fletcher had witnessed all the signatures contained in the statement of desire. According to Mr. Farrell the Registrar told him, "That's fine." And thus relying on that advice Mr. Farrell did not attend the hearing. The above excerpts of the Board's May 29th decision indicate that Mr. Fletcher's attendance and testimony were insufficient to support the statement of desire.

7. The Board has reviewed the evidence and finds that it does not support the claim of detrimental reliance. While Mr. Farrell stated that he relied on the Registrar's advice in not attending the hearing, a close examination of all his testimony as well as the manner in which it was given suggests otherwise. Mr. Farrell first told the Board he could not attend the Board's hearing because his wife has a pre-arranged appointment with a doctor for that day and the appointment could not be postponed. The appointment apparently involved some minor surgery to be performed in the doctor's office. However, on cross-examination Mr. Farrell admitted that he worked the entire day on May 20, 1975 and that his mother drove his wife to the doctor's office and attended to her generally on that day. Accordingly the Board again asked why he could not have attended the hearing. In response to this question we were told that following work he had to attend to his children in that his mother had to go home at that time. But when this response was pursued he admitted that his mother lives immediately nearby his own home. The Board asked why the children could not have stayed with her had he been late in coming back from Toronto and this provoked the response that his children are "hyperactive" and his mother could not cope with them. We are of the opinion that this testimony and the manner in which it was given places Mr. Farrell's credibility in issue.

We further note that Form 5 was posted by the respondent on May 2, 1975 and, as noted above, Form 5 gave the employees notice that the Board had scheduled the hearing of the application for May 20, 1975. The statement of desire in question, designating Mr. Farrell as the representative of the employees who signed it, is dated May 5, 1975. Mr. Farrell led the Board to believe that his wife's appointment was a longstanding and important one. It is therefore reasonable to infer that he knew of his wife's appointment by May 5th and yet he agreed to represent the employees at the certification hearing scheduled for the same date. If this was not the case and the appointment was arranged after May 5th it is difficult to understand why the appointment could not be changed. Additionally, no satisfactory explanation was given for waiting until Friday, May 16, 1975 to telephone the Labour Relations Board.

8. As a result of this testimony we are not prepared to accept the claim that Mr. Farrell reasonably relied upon the Registrar's "advice" if that advice was in fact rendered. Rather we find it is more probable that Mr. Farrell is using a brief and obvious incomplete conversation with the Registrar to justify an absence that is entirely unrelated to anything the Registrar might have said.

9. While this is sufficient to dispose of the request we would also observe that the Rules of Procedure and *The Labour Relations Act* does not give the Registrar the power to vary any of the above reproduced provisions. In fact, the rules are very specific in detailing the extent of his communicative function.

10. In *Hanford Lumber Limited* [1966] OLRB M.R. May 112, the Board was confronted with a request for reconsideration based on somewhat similar grounds. Apparently a clerk employed by the Board had told a group of employees that she would let them know if their presence was required at a Board hearing called for the next week. This she did not do although Form 5 had been posted by the employer and the employees had notice of the content of that form. In refusing to reconsider the matter the Board had the following to say:

9. The Board's method of communicating its Rules and Procedures to the public are similar to those adopted by the courts, that is, by the publication of its Rules in writing, in addition, and this is so with respect to Form 5, section 8, reference to the Board's procedural requirements is frequently made in the prescribed forms. In the case of the rules of court it would surely be unreasonable to assume that the time of entering an appearance, for example, or for the doing of any other act could be altered by the clerk or any other of the office staff of the court with whom one might discuss the matter. Similarly, in the case of the Board's Rules of Procedure, it could not be deemed reasonable for an ordinarily prudent person to accept and act upon the oral statements of an employee of the Board where the written rules provide the answer to the question raised.

10. It may be trite to say that ignorance of the law provides no excuse for failure to comply therewith, nevertheless it is a fact that to permit a plea of ignorance or of misunderstanding or even of misleading advice from an employee to, in effect, revoke, vary or amend the Rules of Procedure would be to open up the Board's Rules to challenge at every turn and to abuse which could only lead to their complete uselessness as authoritative instructions in matters of practice and procedure.

11. The Board has given most careful consideration to the submissions of the objecting employees and has come to the conclusion that in the interest of all parties who may appear before the Board and of the preservation of a consistent and orderly procedure and practice upon whose stability those parties are entitled to rely, it cannot grant to the objectors the relief sought in their telegram and letter.

Thus even if we were satisfied that Mr. Farrell was being candid with the Board the *Hanford* principle suggests that his reliance was unreasonable as a matter of law and Board policy.

11. Finally, we must note that in the particular facts of this case, Mr. Farrell, by his own admission, made no effort to draw the origination requirements of Form 5 to the Registrar's attention, merely stating that Mr. Fletcher had witnessed all the signatures (a

statement which in itself was not completely accurate). Mr. Farrell read Form 5 or should have done so. If the Registrar spoke to Mr. Farrell as alleged, a reasonably cautious person, having read Form 5, should have recognized the incomplete and inaccurate nature of the advice. In other words, Mr. Farrell's claimed reliance is on its face unreasonable – a fact which only goes to buttress the Board's assessment of his testimony.

12. For all of these reasons the request for reconsideration is denied.
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0866-75-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. **Coca-Cola Ltd.**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: D.D. Carter, Vice-Chairman, and Board Members F.W. Murray and P.J. O'Keefe.

APPEARANCES: *E.G. Posen, J. McNamee and R.M. Hill for the applicant; A.D.G. Purdy for the respondent; W. Jones for the group of employees.*

DECISION OF THE BOARD: November 5, 1975

2. The applicant claims status as a trade union by reason of this Board's previous recognition of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (the International union) as a trade union within the meaning of section 1(1)(n) of the Labour Relations Act. The applicant submitted that, since the applicant was merely the International union being carried on under a different name, status as a trade union followed from the Board's earlier recognition of the International union. In essence, the applicant was arguing that it was the same organization as the International union but had simply undergone a change of name.

3. Evidence relating to the events leading up to the change of name was submitted by the applicant. The most significant piece of evidence was an agreement of settlement, naming as parties the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the Brewery Workers C.L.C. and its Locals representing those members of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America, C.L.C. opposed to the merger with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Brewery Workers). This agreement, dealing with the problems created by the lack of consummation in Canada of the merger between the Teamsters and the International union, contained the following terms:

1. The Brewery Workers Propose to change and will cause a change to be made to its name, Union label, trade marks and all other Union identification and insignia to the extent and purpose that its new name, Union label, trade marks and other Union insignia and identification shall be obviously and clearly distinguishable as different from the

present. These changes will be made at a special convention of the Union to be held within six months and shall be put into use within a reasonable time thereafter. Following the adoption of such changed name, Union label, trade marks and other Union identification and insignia and the putting into use thereof as aforesaid, neither the Brewery Workers nor the Teamsters nor any of their respective Locals will use the old Union name, labels, trade marks and identification or insignia of the Brewery Workers. Provided that pending the adoption and putting into use of the changed name, label, trade mark, identification and insignia as aforesaid, the Teamsters shall not directly or indirectly attempt to prevent the Brewery Workers from carrying on with the use of the present name, label, trade marks, identification and insignia.

The Teamsters acknowledge their recognition of the independent existence of the Brewery Workers and acknowledge the bargaining rights held by the Brewery Workers through the United Brewers Warehousing Workers Provincial Board in the Province of Ontario. In accordance with the foregoing it is agreed that Local 334 is a local of the Brewery Workers and that its assets and bargaining rights belong to the Brewery Workers including its bargaining rights with respect to Henninger Brewery. Provided that the assets of Local 334 shall not be deemed to include any monies expended by this Local prior to this date or any per capita or dues collected by it previous to this date. It is agreed that in computing the assets of Local 334 neither the officers nor this Local shall be held accountable for any monies expended or monies collected by way of dues or per capita tax prior to this date.

3. The Brewery Workers hereby acknowledge and accept the independence and separate existence of Local 999 of the Brewery Workers, and acknowledge and accept the right of the Teamsters Local 1999 to hold the assets and bargaining rights formerly enjoyed by Local 999, and in all other respects accept its status as the successor bargaining agent to the latter Local and Brewery Workers International for all employees in all bargaining units represented by them in the Province of Quebec. The Teamsters agree to withdraw their intervention in the CBL application at Three Rivers, Quebec.

4. Save and accept as otherwise stated herein, the Brewery Workers recognize and accept the separate and independent existence from the Brewery Workers of all former Locals of the Brewery Workers in the United States and Canada who have not opposed the merger with the Teamsters.

5. The Brewery Workers hereby accept the merger and affiliation of the Locals of the International Brewery Workers Union located in the United States which are now affiliated with or wish to affiliate with the Teamsters, and of their right to transfer all of their bargaining rights, and status to transfer all of their bargaining rights, and status as bargaining agents and assets, wherever situate, including all of their per-

sonal and real estate, including the International Headquarters building in the U.S.A. and all their properties of whatsoever nature, including, but without limiting the generality of the foregoing, all securities, bank deposits, welfare, Pension funds, all other funds, deposits, credits, etc. and all other monies whatsoever to the Teamsters, pursuant to the Merger/Affiliation Agreements.

6. The Brewery Workers acknowledge the present status as bargaining agents, and the validity of the present bargaining rights held by, all Locals or former Locals of the Brewery Workers who are not opposed to the merger or who are now affiliated with the Teamsters as well as the succession of all of their bargaining rights under collective agreements and otherwise to the Teamsters, and agree that they will not directly or indirectly attack or bring the same into question in any proceedings in any Court, Labour Board or other Tribunal, and that they will not, during the lifetime of any agreement, seek to displace any such Local as bargaining agent.

7. The Teamsters acknowledge the present status as bargaining agents, and the validity of the present bargaining rights, whether under collective agreements or otherwise, held by the Locals remaining affiliated with the Brewery Workers, including those of the Brewery Workers Provincial Joint Board and its constituent Locals, and agree that they will not directly or indirectly attack or bring the same into question in any proceedings in any Court, Labour Board or other Tribunal and that they will not, during the lifetime of any agreement, seek to displace any such Local as bargaining agent.

8. Apart from their respective obligations concerning this settlement, the parties do hereby release, remise and forever discharge each other and the respective officers and members of each other, and their respective executors, administrators, successors and assigns, from all actions, causes of actions, damages, claims and demands whatsoever which they ever had, now have or which they, their executors, administrators, assigns or successors hereafter may have, against each other or their respective officers and members by reason of or rising out of the Merger/Affiliation Agreement of September, 1973, or the adoption thereof at the convention of the International of the Brewery Workers at Cincinnati on November 6th, 1973, as well as the actions taken by the Brewery Workers at the Convention in Winnipeg on January, 1974, and all and every action and Proceeding and things done by the parties as a consequence of the foregoing.

9. The action in the Supreme Court of Ontario commenced by representatives of the Teamsters and former Brewery Workers (No. 1967/4) shall be discontinued forthwith upon the adoption and putting into use as aforesaid of the new name, Union label, trade marks, Union identification and insignia of the Brewery Workers. In the meantime, no steps whatsoever shall be taken by any of the parties with respect to such action which shall remain in abeyance.

10. All applications, actions and other proceedings commenced by or on behalf of the Brewery Workers or any of its members of Locals in the Province of Quebec which in any way contest or affect the succession of the bargaining rights of, or its status as, a bargaining agent or the property of Local 999 to Teamsters Local 1999, will be forthwith withdrawn or discontinued, and the Brewery Workers shall immediately notify the appropriate authorities or tribunals in writing to that effect.

11. The application for certification and the applications for termination of bargaining rights now pending before the Ontario Labour Relations Board (Board files 6124A-74-R, 6125-R, and 6020-74-R) with respect to the employees of Brewers' Warehousing Company Limited and the bargaining rights held by the Brewers Warehousing Company Limited and the bargaining rights held by the Brewers Warehousing Provincial Board shall be forthwith withdrawn and discontinued and the Teamsters shall cause the Ontario Labour Relations Board to be notified in writing to this effect immediately.

12. The Brewery Workers will forthwith notify the Ontario Labour Relations Board in Board files 5355-73-R and 5356-73-R that it withdraws its application for reconsideration of the Board's decision of April 17th, 1974, certifying Local 1000 as the bargaining agent for all employees of Dominion Stores in its retail stores in the Township of Chatham as described in the Board's certificate.

13. The Teamsters will not proceed with any appeal from the Alberta Court of Appeal directed to quashing the certification of Brewery Workers Local 250 with respect to its bargaining rights for the employees of Uncle Ben's Tartan Breweries of Alberta Ltd., Red Deer, Alberta. The Teamsters shall cause the withdrawal of the Section 79 complaint of Robert Gibb.

14. The parties shall take or do, or refrain from taking or doing, all actions and steps and things, including the giving of appropriate notices and sending letters and communications, and requiring compliance with this settlement by all persons and employees who they represent, or act on behalf of, as shall be reasonably necessary to implement the letter and intent of this settlement, and undertake to co-operate and assist one another in this respect.

15. It is understood that this agreement shall be subject to the ratification of the Executive Boards of each party and each acknowledges the authority of their respective Boards to enter into this agreement.

4. On August 16, 1974, this agreement of settlement was signed by both parties subject to ratification as stipulated by the agreement. Subsequently, the Brewery Workers established a committee on structure and organization. This committee, in a report dated December 6, 1974, recommended *inter alia*, that the settlement be accepted, that the

International constitution be amended to implement the changes required by the settlement, that a change of name be effected, and that a new executive position be established. A "special international union convention" was then called for January 31, 1975, to deal with the settlement, the proposal to change the name of the union to "Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers", and the recommendations concerning structure and organization. At the convention the agreement of settlement, the change of name and the recommendation concerning structure were all properly approved. The change of the name was then made effective as of June 30, 1975, through the action of the General Executive Board of the Brewery Workers.

5. The alteration of the International union's constitution raises the question of whether it is appropriate for the Board to invoke s. 94 of the Act and treat its finding that the International union is a trade union within the Act as *prima facie* evidence that the applicant is also a trade union. Our reading of s. 94 is that the evidential presumption contained in that provision applies only where the subsequent application is made by the same organization of employees. In other words, s. 94 does not extend to the situation where the claim to status is derived from the status of some other organization of employees which is constitutionally related to the applicant. Otherwise, the Board would be abdicating its responsibility to determine whether the particular employee organization applying for bargaining rights is a trade union within the meaning of s. 1(1)(n) of the Act.

6. The issue in this case is whether the present applicant is the same organization as the International union. It is obvious that certain changes of structure have occurred between the Board's recognition of the International union as a trade union and the bringing of this application. Are these changes of structure relevant to the issue of whether the applicant is the same organization as the International union? The Board has stated in *Wellesly Hospital*, [1969] O.L.R.B. 31, at p. 35:

...It is our view that whatever the internal organization of a union or changes made from time to time if made in the proper lawful context of its constitution should not normally be a consideration for the Board. It is here alleged that this factor taken with the alleged change of name must lead to the establishment of an entirely different organization that [sic] the applicant purports to be in this application. If we accepted both these propositions on their face we might come to the same conclusion as suggested by the intervener but the main question involved in the first instance is whether the applicant had actually carried out its resolution to change its name.

7. This statement strongly suggests that the benefit of the evidential presumption under s. 94 is not lost because of minor constitutional alterations but it leaves open the question of whether more fundamental alterations in structure may give rise to a different result. In our opinion, changes in form and structure, if of a substantial nature, are a factor to be considered in the application of s. 94, since there is a distinct possibility that changes of this order are simply the outward manifestation of a change in identity. A change of name, especially, is an indication of a change of identity, suggesting that an organization no longer desires to be identified with its constitutional roots. The question cannot be resolved, however, by merely examining changes in form and structure. These changes are only signs that a fundamental change of identity may have taken place within the existing constitu-

tional structure. Of greater importance are the circumstances underlying these changes in form and structure. It must be determined whether the underlying circumstances point to a fundamental change of identity, or merely to minor alterations in form and structure. This determination is primarily a determination of fact to be made in the circumstances of each case. The answer is important, however, since the Board has a responsibility to identify applicant organizations in order to determine whether they have status as trade unions under the Act.

8. Turning to the facts of the instant case, it is evident that the changes in form and structure, including the change of name, all flowed from the agreement between the Teamsters and the Brewery Workers. The terms of this agreement indicate that the International union as such was to continue in existence no longer. The Brewery Workers expressly accepted the merger of the American locals of the International with the Teamsters, and the accompanying transfer of assets to the Teamsters. On the other hand, the Teamsters expressly recognized the independent existence of the Canadian locals opposed to the merger. The Canadian locals, in addition, promised to change the name of the union, so that it would be "obviously and clearly distinguishable as different from the present". Following the adoption of the new name, neither party to the agreement was to use the name or marks of the International union.

9. These facts, in our view, indicate that a change of identity had been effected under the umbrella of the constitution of the international union. Although the use of the International union's constitution ensured constitutional continuity, the fact of constitutional continuity does not mean that the applicant is the same organization as the International union. The agreement between the Teamsters and the Brewery Workers points to the fact that the Canadian locals were to assume a new identity and that the appropriate changes were to be made in the International's constitution in order to achieve this result. The constitution of the International union was merely a remnant of that organization, but a remnant that became the material out of which a new organization was fashioned.

10. Constitutional continuity, although not pointing to a continuation of identity in this case, is relevant in our determination whether the applicant in its own right has status as a trade union. The orderly, and procedurally proper, changes in form and structure that occurred in this case indicate that, although a new organization was created, this organization did not lose the essential characteristics of a trade union that were possessed by its predecessor. There is no doubt in our minds that the applicant has inherited a structure that conforms to the requirements that have been laid down by the Board, and that under this structure the applicant carries out the essential purposes of a trade union. The Board finds, therefore, that the applicant is a trade union within the meaning of s. 1(1)(n) of the Labour Relations Act.

11. The Board, having regard to the agreement of the parties, finds that all employees of the respondent at its plant at Belleville Ontario, save and except office staff, sales supervisors, foremen and persons above the ranks of sales supervisor and foreman constitute a unit of employees of the respondent appropriate for collective bargaining.

12. A statement of desire bearing the signatures of 11 Persons purporting to be employees of the respondent was filed with the Board. Two of these 11 persons subsequently filed revocations, requesting the Board to disregard their signatures on the statement of de-

sire. After examining the evidence relating to the preparation and signing of these revocations, the Board concludes that the revocations do express the true wishes of the two employees. This conclusion eliminates any need to examine the statement of desire, since the revocations eliminate any overlap of the statement of desire with membership evidence of the applicant.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 12, 1975, the terminal date given for this application and the date which the Board determines under s. 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under s. 7(1) of the said Act.

14. A certificate will be issued to the applicant.

1127-75-U, 1131-75-U, 1144-75-U, Canadian Elevator Manufacturers, a Division of the Canadian Electrical Manufacturers Association, (Applicant) v. International Union of Elevator Constructors and its Local 50 and James Hughes, on his own behalf and in his capacity as Business Manager of Local 50, William Morran on his own behalf and in his capacity as Business Representative of Local 50, D. Waldron on his own behalf and in his capacity as a member of the Executive Committee of Local 50 and those persons named in Schedule "A" attached hereto, (Respondents).

BEFORE: George W. Adams, Vice-Chairman, and Board Members W. Lisson and N. Satterfield.

APPEARANCES: *P. Ross Dunsmore and Robert D. Suddard for the applicant; A.E. Golden, G.N. Cass and J. Hughes for the respondents.*

DECISION OF THE BOARD: November 6, 1975

1. This matter pertains to three applications filed under sections 82, 83 and 123, respectively. The applications were consolidated by the Board under Rule 56 of the Board's Rules of Procedure because they arise out of a common factual setting.

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3. Some of the background to the particular bargaining relationship was reviewed in a number of earlier decisions of the Board and need not be reconsidered in any detail here. Suffice it to say that because of a costly industry shutdown arising out of the 1972 negotiations between these parties and others, the Government of Ontario enacted the *Elevator Contractor Unions Disputes Act*, 1973, S.O., c. 1, requiring the International Union of Elevator Constructors, its Ontario locals and five elevator companies to submit their differences to final and binding arbitration. The majority of the board of arbitration constituted under this legislation introduced a number of new provisions into the agreement that was eventu-

ally decreed and it understates the problems now confronting these parties to say that they cannot agree on the meaning to be attributed to many of these new provisions.

4. The extent of such dissention is reflected in Board File 7425-74-U. In that case the employer association had taken the position that a long-standing permit system in the industry had been materially affected by an arbitral modification of Article III of the collective agreement and by the insertion of an entirely new article – Article X(A). The Board found that in disagreeing with that position the respondent trade union had unlawfully instructed one group of employees to cease work altogether and another group of employees to refrain from working with any of the employees who disobeyed the direction to stop work.

5. The applicant employer association relies upon this earlier determination in requesting the following relief:

- a) THAT the International Union of Elevator Constructors and its Local 50 cease and desist from calling or authorizing an illegal strike;
- b) THAT James Hughes, William Morran and D. Waldron cease and desist from counselling, procuring, supporting or encouraging the unlawful strike;
- c) THAT the employees named above cease and desist from engaging in an unlawful strike;
- d) THAT the International Union of Elevator Constructors cease and desist from their present practice of withholding its agreement from employees who have been working as temporary mechanics until such time as the matter is properly decided in accordance with the provisions of the collective agreement between the parties;
- e) THAT James Hughes and William Morran, agents of Local 50, immediately inform all the employees in the bargaining unit who were temporary mechanics on October 15, 1975 that the Union agreement that these employees may work as temporary mechanics is no longer withheld and that their refusal to work as mechanics constituted an illegal strike;
- f) THAT James Hughes and William Morran, agents of Local 50, deliver, as soon as possible, copies of this decision to all the employees involved and to the International Union of Elevator Constructors and its Local 90 and 96;
- g) THAT the Respondents, their respective agents and servants, and any person acting under their instructions, or instructions of any of them or anyone aiding or assisting them or any of them and those to whom notice of this decision shall come comply with all the directions of the Board in this matter.

6. On the other hand counsel for those against whom this relief is sought submits that the facts and principles outlined in Board File 7425-75-U and other related files have no application to the facts at hand and that the applications under section 82 and 123 ought to be dismissed. In fact it is the position of Local 50, as evidenced by its application under section 83, that the actions of Otis Elevator Company Limited, Montgomery Elevator Company Limited and Turnbull Elevator, Division of Dover Corporation (Canada) Limited, constitute an unlawful lock-out of employees and it requests the Board to:

- a) Direct that the Respondent Otis Elevator Company Limited cease and desist from its unlawful lock-out and immediately re-employ those persons named in Schedule "A" as Elevator Construction Helpers.
- b) Direct that the Respondent Montgomery Elevator Company Limited cease and desist from its unlawful lock-out and immediately re-employ those persons named in Schedule "B" as Elevator Construction Helpers.
- c) Direct that the Respondent Turnbull Elevator, Division of Dover Corporation cease and desist from its unlawful lock-out and immediately re-employ those persons named in Schedule "C" as Elevator Construction Helpers.
- d) Direct that the Respondents, their respective agents and servants, and any person acting under their instructions of any of them or anyone aiding or assisting them or any one of them and those to whom notice of this direction shall come comply with all the directions of the Board in this matter.

7. All of the persons named in Schedule A are employees classified as elevator construction helpers (hereinafter referred to as "helpers") under the collective agreement and, until October 16, 1975, they had been employed in the capacity of "temporary mechanics" in accord with Article X, Par. 4 of the collective agreement which reads:

Par. 4. A Joint Examining Committee shall be appointed consisting of three (3) representatives from the Employers and three (3) from the Local Union. No Helper may qualify or be raised to the capacity of Mechanic until he has worked for a period of two (2) years in the elevator industry and has passed an examination administered by the Joint Examining Committee. The Education Committee shall develop and periodically update a standardized Mechanics (and Helpers) examination which will be used in each Local. Should he fail to qualify, an individual cannot again take the examination in less than one (1) year. A Helper may work as a Temporary Mechanic after he has served a probationary period of six (6) months, upon agreement of his Employer and the Union Representative, or the Regional Director in open territory, and at the same scale of wages as a regular mechanic.

Because of the provisions of the collective agreement stipulating the character of work that helpers can do without the direction of a certified elevator constructor mechanic (herein-

after referred to as a “mechanic”) it is clear that these particular employees could not perform the work they have been performing (maintenance and service work) without the consent of the trade union under Article X, Par. 4. In other words, there is no dispute that save for Article X, Par. 4 the employers have no contractual right to request the helpers to perform the maintenance and service work they have been performing. It is also important to note that Article X, Par. 4 has long existed in the collective agreements between these parties and does not constitute one of the recent amendments mentioned above.

9. It was established that employment opportunities in the industry have recently diminished and a number of qualified mechanics are without work. Mr. William John Morran, a business representative for Local 50, and Mr. James George Hughes, Business Manager for Local 50, testified that prior to October 16 they approached representatives of the elevator companies in an effort to place these qualified mechanics. They were successful in placing eight to ten unemployed mechanics but at least six qualified mechanics remained unemployed. They therefore requested the representatives of Otis Elevator Company Limited, Montgomery Elevator Company Limited and Dover Corporation (Canada) Limited (hereinafter referred to as “Otis”, “Montgomery” and “Dover”, respectively) to absorb these men on a ratio based upon the number of temporary mechanics each company was then using. At the time Dover was employing seventeen temporary mechanics and Otis and Montgomery were employing thirteen and three, respectively. Representatives of each company refused this request and Morran responded by asking them to “knock down” an equivalent number of temporary mechanics – in effect requesting that at least six temporary mechanics be returned to the status of helpers. Both Montgomery and Otis complied with this latter request; however, Dover did not. And none of the three companies have placed a request with the trade union for mechanics.

10. Morran and Hughes testified that in applying Article X, Par. 4 of the agreement it has been a long-standing custom in the industry to revert temporary mechanics to their actual status as helpers whenever qualified mechanics are out of work and that the above-described actions of the employers immediately preceding October 16 was an unprecedented violation of the custom. And on reviewing the evidence of Mr. Charles Hawley, a branch superintendent for Dover, we are satisfied that both of these observations are accurate. Morran and Hughes explained that it was only in response to this unexplained deviation from past practice that they wrote to the employers withdrawing their consent to the employ of the persons on Schedule A as temporary mechanics under Article X, Par. 4 and “instructed” the persons on Schedule A to report to work only as helpers.

11. It would appear that on October 16th the persons on Schedule A reported to work ready to perform work as helpers but refused to perform the work that they had been doing because they were no longer temporary mechanics. The companies refused to employ them as helpers insisting that they continue to perform the work they had been performing and a stalemate developed. Whether the employees have continued to report to work and offer their services as helpers is unclear and, for the purposes of this decision, not material.

12. The principal witness for the applicant employers was Mr. Robert Suddard. He is employed by Otis Elevator Company Limited and represents all four applicants in labour relations matters. He testified that the employers take the position that the trade union’s consent under Article X, Par. 4 is not “a yo-yo” proposition. It was explained that, in their opinion, once the trade union’s consent is given “it remains forever”, whether or not qual-

ified mechanics are out of work. However, no evidence was called to support this theory and it appears totally inconsistent with the past practice of the parties developed in evidence before this Board.

13. Unfortunately, neither the employers nor the trade union had filed grievances in response to their respective stances and thus very little in the form of rationale problem-solving is being undertaken by either party to the agreement.

14. Therefore, we are being asked either to provide relief to the applicant employers whose actions precipitating the dispute are, in our opinion, unsupported by a reasonably arguable interpretation of the contract or to assist a trade union who has refrained from pursuing the more rationale dispute-resolving procedures provided by the collective agreement. We decline both these opportunities and dismiss all three applications.

15. The Board's power under sections 82, 83 and 123 are discretionary and ought to be exercised in accord with sound principles of industrial relations. While the Board has a public obligation to foster and maintain industrial peace, it cannot be said that this obligation can only be fulfilled by the reflex-like exercise of the Board's powers under these sections. Where, as in this case, an employer deliberately embarks upon a course of action that is unsupported by a reasonably arguable interpretation of the collective agreement, thereby primarily, and we might say baldly, resting its claim on the principle that an employee is obligated "to perform first and grieve later", this Board would not be serving the public by buttressing such recklessness with the full force of the laws of this Province. We of course approve the aforementioned arbitral principle and the Board must be wary in interpreting collective agreements even on a very limited basis. But the application of the arbitral principle in discipline cases is a qualitatively different function than using it to specifically enforce the demands of an employer under the sections in question. To issue such powerful relief in the peculiar circumstances of this case could well undermine the integrity of the Board's orders and discourage the self-restraint required in a complex industrial society. Very similar sentiments, quite appropriate to this case, were expressed by the Board in *Northdown Dry-wall and Construction Limited* [1972] OLRB Mthly. Rep. June 666 where the majority of that panel evidenced its concern for self-government in the following way:

...We recognize that this Board has an obligation to maintain industrial peace. We recognize that there is an obligation on the industry to assist in maintaining industrial peace by conducting its affairs in an orderly and careful manner so as to avoid the tensions and conflicts that are already rampant in the construction industry. There must be some form of self-help or policing by the industry. This Board is not to be viewed as a panacea for the ills of the construction industry. We do not sit as Solomon ever ready to divide the baby. We expect that the parties will exercise some self-restraint in their affairs and not expect this Board to be a forum which absolves them from excesses.

16. The facts obtaining in Board File 7425-74-U are distinguishable in that the provisions of the contract in that matter were reasonably in dispute; although even in that case the Board adopted a unique procedure to assure itself that industrial peace would be best served by the exercise of its remedial powers.

17. It must be emphasized that very similar reasons of policy cause us to dismiss the trade union's application. We are of the opinion that the trade union's section 83 application is merely a strategic device designed to reinforce a self-help posture that also offends the admonition contained in *Northdown Drywall* and we decline to play a role in this "game". Thus, even if we were satisfied that the employers' actions constituted an unlawful lock-out, we would have refused the relief requested. However, we are of the opinion that the application fails on the statutory definition of a lock-out in that the employer has continued to offer employment to the employees affected – albeit on its terms.

18. For all of these reasons the matters are dismissed.

0950-75-U Claude Browne, (Complainant) v. **Canron Ltd., Eastern Structural Division**, (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *B. Iler and C. Browne for the complainant; E. T. McDermott for the respondent; G. Perly for Canadian Workers Union.*

DECISION OF THE BOARD: November 6, 1975

1. During the course of the inquiry by the Board into the status of the Canadian Workers Union to take part in these proceedings the Canadian Workers Union sought to call counsel for the respondent with respect to alleged admissions against interest made by counsel for the respondent during proceedings before another panel of the Board. The admissions are alleged to relate to the question as to the right of the Canadian Workers Union to intercede in these present proceedings.

2. Counsel for the respondent objected to being called as a witness. The Board reserved its decision on the matter and adjourned, having advised the parties that it would issue a decision on the question prior to the next session.

3. Having regard to the submissions of the parties, the Board finds that Mr. Edward T. McDermott, counsel for the respondent, is compellable as a witness with respect to the issue of the Canadian Workers Union's status to intervene, if properly subpoenaed by the Canadian Workers Union.

0651-75-U Damiano Pedalino, (Complainant) v. Local 5595 U.S.W.A. (United Steelworkers of America) Sub District 6 U.S.W.A. Algoma Steel Corporation Limited, (Respondents).

Before: George W. Adams, Vice-Chairman, and Board Members E. Boyer and L. Hems-worth.

APPEARANCES: *Damiano Pedalino for the complainant; Leslie Woodcock and Clarence Papineau for the respondent trade union; F. Foster, D.W. Murray and K. Theisen for the respon-dent company.*

DECISION OF BOARD MEMBERS E. BOYER AND L. HEMSWORTH: November 5, 1975

1. Having regard to all the evidence and representations of the parties we are satisfied that the officers of the respondent trade union had taken all reasonable steps in the processing of the complainant's grievance and therefore would dismiss the case.

DECISION OF GEORGE W. ADAMS, VICE-CHAIRMAN:

1. I dissent.

2. This is a complaint under section 60 of *The Labour Relations Act*, R.S.O. 1970, c. 232, as amended by 1975, c. 76.

3. The respondent United Steelworkers of America (hereinafter referred to as "the Steelworkers") holds the bargaining rights for the bargaining unit in question although, with the consent of the Steelworkers, the respondent Local 5595 (hereinafter referred to as "Local 5595") administers the collective agreement with the Algoma Steel Corporation Limited (hereinafter referred to as "Algoma") that covers the employees employed in the bargaining unit.

4. The complainant was suspended from the employ of Algoma on May 1, 1975 and formally discharged on May 29, 1975.

5. The reason given for his discharge was the falsification of certain pre-employment documents and the complainant does not deny the offence. Prior to becoming employed by Algoma the grievor worked in Elliot Lake for Dennison Mines until 1972. From 1959 he was plagued by a constant back ailment and in 1970 he began receiving Workmen's Compensation payments. In 1972 he left Dennison Mines because of the physical difficulties associated with performing certain painting work assigned to him and moved to Sault Ste. Marie. In Sault Ste. Marie his physical problems were treated by a Dr. Banergee and apparently he became well enough to take employment without compensation. But, according to the complainant, on revealing his medical history to each prospective employer, he was refused employment. Accordingly, he decided to conceal his medical history from Algoma when applying there for a job.

He was hired by Algoma in July of 1974 and worked on a variety of jobs for ten months. But on March 3, 1975 he hurt his foot and was put on light duty. He continued to

work until it became clear to him that his foot was not getting better. He then consulted a doctor and the doctor advised that he go on compensation and stop working. The grievor testified that prior to seeing the doctor it was clear that the company did not want him to go on compensation and when he called his general foreman on April 10th to announce the doctor's advice the foreman remarked that it was going to cost the company a lot of money. He was offered but declined a sit-down job, preferring to take the doctor's advice. According to the complainant he was subsequently called by a Mr. Klaus for Algoma and asked where he worked before coming to Algoma. He returned to work on April 25, 1975 and worked until May 1, 1975.

On May 1, 1975 Mr. Foster, Algoma's Manager of Employee Relations for the Tube Division, called him into his office and told him he was indefinitely suspended for lying to the company's physician. Mr. Henry Nelson, a union steward, was present.

6. Nelson told the complainant to see Mr. Les Woodcock, a staff representative for the Steelworkers, and the complainant did this the same day. Woodcock advised him that his case was not strong because of his wrongdoing and his short service but that the union would do what it could. Woodcock gave him the telephone number of Paul Beaulieu, the Chairman of Local 5595's grievance committee.

7. Although Beaulieu was on vacation at the time Woodcock must have apprised him of the complainant's problem on May 1, 1975 because on that same day Beaulieu telephoned Foster and requested an extension of the grievance time limit until his return to work on May 12, 1975. The time limit was extended to May 16, 1975. Mr. Papineau, the President of Local 5595, was also informed of the grievance and he asked Mr. Foster for an explanation on either May 6th or 7th. After Beaulieu's return to work, he and Carl Muir, another member of Local 5595's grievance committee; also met with Foster and on May 14, 1975 a grievance was formally filed on the complainant's behalf. But this step appears to have been more of a safety or strategic measure than an indication of the committee's intent in that after speaking with Foster neither Papineau nor Beaulieu believed that a grievance would succeed. Foster, to use his own words, "did not leave much of a door open" and the company had recently disposed of a similar grievance in an identical fashion. Some time after May 14, 1975 Beaulieu and Papineau conferred with each other and decided against taking the matter to arbitration. This decision was reported to a regular executive meeting held on June 2, 1975 and then reported to the monthly general membership meeting held on Tuesday, June 10, 1975. Notice of the latter meeting is posted in the union's office a week prior to the scheduled date but the Board was advised that the specific agenda of the meeting is not posted. And in response to a question from the Board Mr. Papineau admitted that the complainant was not notified that his grievance was to be discussed at the membership meeting.

8. Throughout the month of May the complainant telephoned Woodcock continuously requesting information about his grievance. Woodcock determined that Beaulieu had filed a grievance but he was not directly involved in Local 5595's grievance procedure and therefore he was unable to provide the complainant with any detailed information. The evidence does not explain the complainant's inability to obtain information about his grievance directly from either Beaulieu or Papineau but we are satisfied that a breakdown in communications did occur because on June 3rd, 1975 the complainant went to the Ontario Human Rights Commission for assistance.

9. A Human Rights Officer telephoned Woodcock about the complainant's grievance on that same date and Woodcock testified that he was asked if a grievance had been filed. He informed the Board that after checking with Beaulieu, he informed the officer that one had been filed. On the other hand, the complainant's complaint, which was prepared by the Human Rights Officer, alleges that Woodcock "gave assurances that a meeting would be held as soon as possible and that the complainant would be contacted". The complaint is dated July 22, 1975 and goes on to allege that "[h]e was not contacted".

And this allegation is buttressed by Woodcock's own admission that on June 5th, the complainant called him at home and requested to be present at any meeting with the company. Woodcock replied that he would call Local 5595 and when Beaulieu was called on June 6th Woodcock was told that the meeting had already taken place. Woodcock then asked for a copy of the company's answer and on that same day he called the complainant and relayed the information to him. A few days later the complainant again telephoned and according to Woodcock he was very upset and threats of violence were made against Woodcock. Woodcock told him not to call again and apparently Papineau's telephone number was given to him at that time. Woodcock testified that several days after this he telephoned Papineau and was assured that the complainant had been informed that his case had been dropped and that the only chance for relief rested with future contract negotiations.

10. Papineau told the Board that "as a result of our meeting" – presumably a reference to the general membership meeting – he told Beaulieu to let the complainant know about the disposition of his grievance. Unfortunately Beaulieu was in hospital at the time of the hearing and thus the Board does not know whether he followed these instructions. However, Papineau testified that when the complainant telephoned him – presumably after the complainant's conversation with Woodcock on June 5th – the complainant was informed that the only recourse for the grievance was to have it considered in future contract negotiations. The grievor denies that he was so informed but because of his difficulties with the English language he may have misunderstood.

11. Having reviewed all of the evidence I am satisfied that the only basis to this complaint lies in the trade union's failure to notify the complainant that his grievance would be discussed at the general membership meeting on Tuesday, June 10th. Save for this feature of the case the evidence supports the conclusion that Woodcock, Papineau and Beaulieu approached the grievance in a diligent and reasonable manner. Therefore it cannot be said that the decision of the grievance committee to abandon the grievance was discriminatory, arbitrary or in bad faith.

12. But based on Papineau's evidence, the decision of the grievance committee was not the final determination in that he and Beaulieu refrained from contacting the complainant until after reporting the committee's judgment to the general membership meeting and it is the failure of the trade union to notify the complainant that his grievance would be discussed at this meeting that causes me concern in the peculiar circumstances of this case. In fact when the occurrence of the meeting was revealed at the hearing the complainant expressed his disappointment in not being notified and thereby being deprived of the opportunity "to defend" himself.

13. In *Joseph Pap v. International Union of Electrical, Radio and Machine Workers, Local 523 v. RCA Victor Limited, Prescott, Ontario* [1974] OLRB Mthly. Rep. Jan. 60 the

Board was confronted with a very similar situation. In that case the grievor had been discharged by a company and as well as filing a grievance, the grievor retained his own lawyer. The lawyer put himself on record with the union but the union at no time advised either the grievor or the lawyer that it was going to discuss the grievance at its monthly meeting. In finding that this failure to notify the grievor constituted a violation of section 60 the Board expressed itself thusly:

10. However, we are of the opinion that where a union adopts a procedure it must act properly within the confines of its own procedure and do all that is reasonable within those limits.

11. In this case it may very well have been that had Mr. Pap or his counsel attended the union meeting they might have been able to make representations which would have changed the minds of the members in attendance and thereby allowed the grievance to proceed to arbitration. It is obviously the intent of the union in holding an open meeting to deal with grievances to provide a democratic forum for its membership to voice its opinion.

12. But the union by its omission denied Mr. Pap and his lawyer the right to attend the union meeting. This was not mere negligence; it was either an intentional act or an act that was, in the circumstances, so reckless that it must be considered to be intentional. The act of the union officials was therefore to deny Mr. Pap the democratic right to attend at a meeting to put his position before the membership and within the limits of the union's own procedure it acted arbitrarily.

13. Nor are we prepared to find that Mr. Pap who was reasonably knowledgeable about union affairs should have attended or ought to have known that he should have attended the union meeting. The union is the bargaining agent for Mr. Pap, and, as such, has a responsibility towards him. As the bargaining agent for employees it has been the traditional role of unions to assist the employees. Union officials and representatives usually have greater knowledge than the employee with respect to matters of collective bargaining and particularly with respect to individual employee's relationships with their employer. Because of this expertise and experience the union had an obligation to notify Mr. Pap and it is not relieved of its obligation merely because Mr. Pap should have known to attend the regular monthly meeting.

14. Thus, the union's own standards which provided employees with a democratic forum were violated.

15. The denial of access to the union meeting, if not arbitrary, was discriminatory, since Mr. Pap should have been allowed the same access to the union as were other members of the union. By its actions the union denied Mr. Pap that access and in these circumstances we therefore find that the union is in violation of section 60 of The Labour Relations Act.

16. It might be argued that the conduct of the union was merely an internal matter and, as such, was not prohibited conduct in the "representation" of employees, in the sense that representation concerns the relationship between the union and the employer and that section 60 is intended to deal only with matters external to the union. Even if that be so the union meeting was concerned about the right of the employee to grieve, and, as such, was an intervening union procedure which is part of the total grievance arbitration process which directly concerns the relationship between the union and the company, and, as such, falls within the scope of the word "representation" in section 60.

14. I find that the reasoning applies in the circumstances of this case. The trade union knew that the complainant was concerned about his grievance, particularly by the time an officer of the Ontario Human Rights Commission contacted Mr. Woodcock. Yet despite his obvious desire to be kept fully informed and involved in the decision-making Processes of the grievance procedure no one notified him that his grievance was going to be considered at a meeting that he had a legal right to attend and speak at. This is not to say that a union must keep in continuing contact with an employee it is representing and invite him to attend decision-making meeting where he has no legal right (outside section 60) to attend. But where an employee has clearly raised his concern over a grievance as in the facts at hand (particularly a discharge case) and the trade union is going to recommend against its pursuit at a meeting to which the grievor has a legal right to attend, I am of the opinion that the trade union is obligated to notify the employee of the time and place of this meeting unless practical necessities dictate otherwise. Of course it might be said that the basis of the grievance is so questionable that the grievor would have either failed to move his fellow members or failed at arbitration in any event. But in my opinion this response assumes too much. First, I would not disagree that boards of arbitration consider the grievor's admitted offense to be very serious but the dismissal of such a grievance cannot be considered beyond doubt provided that the complainant's back is sound today. (See *Re Guild Mfg. of Canada Ltd. and U.S.W.* (1972) 1 L.A.C. (2d) 314 (Shime) upheld [1973] 2 O.R. 2791, 33 D.L.R. (3d) 527 and *Re Loblaw Groceries Co. Ltd. and Union of Canadian Employees* (1973). 3 L.A.C. (2d) 325 (Adams).) Secondly, because of his medical history the grievor's job prospects for the future are bleak and thus this grievance represents a small ray of economic hope to the grievor. By failing to notify him that his grievance would be disposed of at the general monthly meeting in June the trade union deprived the grievor of an opportunity to communicate his plight to his fellow members. Given his short service and the reasons for his dismissal, the membership may have approved the judgment of the grievance committee despite his presence and section 60 would have no application. But this is pure speculation. We have no way of actually establishing what the general membership would have done unless we provide the complainant with the opportunity he was deprived of. In short, I find that the trade union dealt with the grievor in an arbitrary manner in failing to notify him that his grievance would be discussed at the general membership meeting.

15. Having found a violation of section 60 we must now fashion a remedy already alluded to in the preceding paragraph. There is no hint in the evidence that the trade union was motivated by bad faith or a desire to discriminate against the complainant in processing his grievance and therefore I see no need for the Board to assess the merits of his grievance. Moreover, the complainant has no legal right to have his grievance arbitrated. Rather I

would wish to put him in the position he would have been in had he not been dealt with in an arbitrary manner and the most appropriate way to effect this end in these circumstances is to direct the trade union to reconsider his grievance at another membership meeting and to notify the complainant of the time and place of this meeting. The complainant would then have the opportunity to address his fellow trade union members. If the membership endorsed the grievance committee's recommendations once again, but after having heard what the complainant had to say, that would be the end of the matter. However, if the membership decided to refer the matter to arbitration, I would have directed the trade union and the employer to arbitrate the matter, notwithstanding the time limit provisions of the collective agreement

16. In *Imperial Tobacco Products (Ontario) Ltd.* [1974] OLRB Mthly. Rep. 418 the Board held that an employer is a proper party in a section 60 complaint and justified its conclusion on a number of alternative grounds that need not be reviewed in detail here. For the purposes of this case it is sufficient to emphasize that the employer participated in the proceedings before the Board and section 79(a)(c) of *The Labour Relations Act*, R.S.O. 1970, c. 232 provides the Board with power to make directions "notwithstanding the provisions of any collective agreement".

In *Imperial Tobacco* I observed that section 60 has been modelled on a concept elaborated by the United States Supreme Court in *Vaca v. Sipes* (1967) L.C. ¶11,731 and in the *Vaca* case the United States Supreme Court reviewed the merit of joining the employer as a defendant in a fair representation suit in the following way:

"Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact the employer may be (and probably should be) joined as a defendant in the fair representation suit..."

I am of the opinion that the words "notwithstanding the provisions of a collective agreement" were inserted in section 79 for the same reasons. If an employer was not a proper party to a complaint of this kind it could hide behind both a union's wrongful act and the timeliness provisions under the collective agreement that a trade union's wrongful act may be activated. Furthermore, while it may be that in certain instances the Board ought to adjudicate the grievance itself, relying on its power under section 42 and section 60 as explained in *Imperial Tobacco*, the principle of exclusivity in section 37 behooves the Board to rely on grievance arbitration where the Board is satisfied that the arbitration procedures can provide adequate and fair relief. (See the discussion in *Imperial Tobacco*.) And the only way the Board could rely upon that process is by relieving against the timeliness provisions of the collective agreement by way of the power conferred on it under section 79(4)(c). This is what I would have done in the instant case.

1156-75-U North Queen Transport Limited. (Applicant) v. The International Brotherhood of Teamsters, Local Union 938, Roman Mosar and others as per Schedule A, (Respondents).

BEFORE: K.M. Burkett, Vice-Chairman:

APPEARANCES: *R. Cumine and F. Znidarec for the applicant; P. Cavalluzzo, F. Johnston and Gary Cass for the respondents.*

DECISION OF VICE-CHAIRMAN K.M. BURKETT: November 5, 1975

1. This is an application under section 82 of the Labour Relations Act.

2. On the evidence before it the Board finds that the applicant company, North Queen Transport Limited, was a party to a collective agreement with the Labourers International Union of North America, Local 1267, which expired on October 12, 1975, as per Article 21 of that agreement. The Board further finds that the Labourers Union Local 1267 served notice of its intent to bargain for a renewal of the collective agreement by letter dated July 2, 1975, and entered into negotiations for the purpose of renewing the collective agreement and did in fact sign a Memorandum of Settlement on Monday, October 27, 1975. At no time did the parties make application for conciliation services.

3. The events giving rise to this application as adduced in evidence are as follows: At approximately 4 p.m. on Thursday, October 23, 1975, the employees of North Queen Transport Limited listed as respondents in Schedule A, with the exception of Messrs. Tabor, Zdybal and Kleinberg, left work or refused to report for work and congregated at the main gate of the Queensway Piggyback Terminal at 36 N. Queen Street. Shortly thereafter Mr. Frank Znidarec and Mr. John Znidarec owners of North Queen Transport Limited and Mr. Ed Wilson the manager of the Eastern Region of the C.P. Rail Intermodal Services Division approached the gate, whereupon a discussion took place with the employees who had congregated there. The employees voiced their displeasure with the conduct of their contract negotiations. Mr. Frank Znidarec informed the employees that they were breaking the law and gave them a half hour to decide if they would return to work or face discharge. Ten minutes later the employees called Mr. F. Znidarec and informed him that they would not return to work. Mr. F. Znidarec testified that he proceeded to discharge these employees and directed his payroll clerk to prepare separation papers. The picketing which continued on Thursday evening interfered with the normal flow of truck traffic through the gate at 36 N. Queen Street. Mr. J. McPherson, Business Manager for the Labourers Local 1267 arrived at the picket line at approximately 9:30 p.m. and testified that he urged the men to return to work.

4. On Friday morning October 24, 1975, the picketing continued and the persons on the picket line were joined by officials of the International Brotherhood of Teamsters local union 938 who were identified as Mr. Fred Johnston, Mr. Carl Newman and Mr. Bill Rielly. These three men were seen talking to drivers of incoming trucks who were then seen to turn and drive away. It was the uncontradicted testimony of Mr. Wilson, that he saw Mr. Rielly approached a Riemer Unit and two Smith units which then turned and went away. He also testified that about \$500,000 in business had been lost to the Terminal as a result of the strike. Mr. MacPherson testified that Mr. Rielly informed him that the Teamsters

"supported the men". There was no evidence called to dispute this testimony. Three other employees of the company were also seen on the picket line on Friday morning. These were Messrs. Tabor, Zdybal and Klienbergl. Later that morning Mr. Fred Johnston, the president and business agent of Teamster local 938 approached Mr. E. Wilson and asked if he would use his office to effect a settlement of this dispute. He proposed that all picketing would stop if (a) all of the men on the picket line were returned to work without reprisal and (b) the men were allowed a secret ballot vote on the terms the memorandum of settlement arrived at between North Queen Transport Limited and the Labourers. This proposal was rejected by Mr. F. Znidarec.

5. The picketing continued on Saturday and Sunday October 25 and 26, 1975. Mr. Klienbergl, who had not been discharged on Thursday, October 23 because he was not present when the picketing had begun returned to work on Saturday, October 25, 1975.

6. The picket line remained in place on Monday morning October 27. Late that morning a committee of picketers accompanied by Mr. F. Johnston of the Teamsters visited Mr. Wilson and made the same proposal for settlement as had been put forward by Mr. Johnston on Friday October 24 (para 4). It was rejected. On Monday evening Mr. Dario Perdomo and five other discharged employees went to the office of Mr. F. Znidarec and asked if they could return to work. It was Mr. Perdomo's testimony that Mr. Znidarec said that it was up to the Labourers union. This evidence, however, conflicts with that of Mr. MacPherson in this regard. Mr. MacPherson stated that as a result of this meeting he attempted to get Mr. Znidarec to reconsider. The Board is not prepared to accept the uncorroborated evidence of Mr. Perdomo on this point. In any event Mr. Znidarec refused to take the men back indicating that if the picketing were to stop he would consider rehiring the individuals as the need arose.

7. The picketing continued until sometime on Tuesday October 28, at which time a court order was obtained by the applicant prohibiting the picketing at 36 N. Queen Street. At the injunction hearing a written undertaking (Exhibit #4) on behalf of the respondents was put before the applicant. It was rejected.

8. Mr. Fred Johnston, called as a witness on behalf of the respondents, testified that he was both the Recording Secretary and the Business Agent of Teamster, Local 938. He testified that he had been an officer, on and off, for a period of 16 years and that he had held office for the last six consecutive years. It was his evidence that he received a telephone call from Mr. W. Rielly at about 1:30 a.m. on Friday, October 24, 1975, reporting a picket line at the Queensway Piggyback Terminal which was creating problems for Teamster members. He told Mr. Rielly that they would visit the site in the morning which they subsequently did. He testified as to an initial confrontation with Mr. Wilson with regard to the Teamster presence and of his efforts to return the men to work (as described in paras #4 and 6). He denied certain statements appearing in the particulars submitted by the applicant. Firstly, he denied that Teamster representatives were present at "about 7:00 p.m. on the 23rd day of October 1975" as stated in the first sentence of the second full paragraph appearing on page 2 of the particulars. Secondly, he denied that Teamster officials advised that the picket line would disappear if the applicant would "negotiate a contract with local 938" as stated in the last sentence of the second full paragraph appearing on page 2 of the particulars. The Board finds that there is no evidence which would support either of these written statements. Mr. Johnston testified that he was aware that the persons on the picket line signed Teamster membership cards on Friday, October 24, 1975.

9. In cross examination, Mr. Johnston admitted that he did not instruct Messrs. Rielly and Newman to stop talking to Teamster drivers who were approaching the gate at 30 N. Queen Street, stating that they had a right to do so. Mr. Johnston did not at any time counsel, or instruct the discharged employees to stop picketing. Rather his evidence was that he told these persons that they were "in an illegal position." However, the evidence of Mr. Dario Perdomo, a named respondent who testified on behalf of the respondents was that no one from the Teamsters Union said that the activities of the named respondents were illegal.

10. Mr. DARIO Perdomo gave evidence as to the events which occurred during the period in question and he also testified as to the sequence and conduct of the negotiations which were taking place between the company and the labourers union and to the growing dissatisfaction with the Labourers as bargaining agent.

11. The evidence shows that on Saturday, October 25, 1975, North Queen Transport Limited and the Labourers union concluded a memorandum of settlement containing the terms to be incorporated into a new collective agreement replacing the agreement which expired on October 12, 1975. The memorandum was signed by the parties in the office of Mr. F. Znidarec on Monday evening, October 27, 1975. The evidence also shows that Teamster Union Local 938 filed an application for certification as bargaining agent for the employees of North Queen Transport sometime on Friday, October 24, 1975.

12. Mr. R. Cumine appearing on behalf of the applicant argued that the recent amendments to section 82 of the Labour Relations Act which gives the Board the power to direct what action "a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike", are designed to remove these matters from the courts and to Provide an expeditious means of dealing with them. He acknowledged that for all but three employees (Messrs. Klienber, Tabor and Zdybal) the unlawful strike ended when they were terminated on Thursday, October 23. He agreed, in the fact of the Board's usual refusal to exercise its declatory discretion when an unlawful strike has ended prior to a hearing pursuant to section 82, that in this instance the strike continued at least with regard to Messrs. Tabor and Zdybal (Mr. Klienber having returning to work on Saturday, October 25) and that the officials of Teamster Local 938 supported and encouraged it. He argued that the Teamster picket line activities on the one hand and its application for certification on the other demonstrate a hypocritical disregard for the law, and that the Board should exercise its discretion to at least declare that the Teamster officials supported and encouraged an unlawful strike and direct Teamster Local 938 and its officials to refrain from supporting or encouraging an unlawful strike.

13. Mr. Cavalluzzo appearing on behalf of the respondents argued that the legislature intended that the power of the Board to direct under section 82 would follow, and only be used after a declaration of an unlawful strike had been made. He asked that the Board exercise its discretion and not grant a declaration. He asked that the Board consider the quality of the Labourers representation and the continuous efforts of the Teamsters to resolve the matter as mitigating factors would cause the Board to refrain from issuing a declaration. In addition he argued that the applicant in refusing to alter its decision to discharge made it impossible for employees to return to work thereby thwarting a primary purpose of the declaration being sought.

14. In the alternative Mr. Cavalluzzo argued that the Board's jurisdiction under section 82 is limited to a declaration with respect to an unlawful strike and in its discretion to a direction with respect to the unlawful strike. Mr. Cavalluzzo argued that at the time the employees first offered to return to work on the Friday morning the unlawful strike become an unlawful lockout, thereby precluding the Board from making a declaration or direction with respect to the activities which occurred after this time. Implicit in this argument and in keeping with the usual Board practice is a request that the Board make no declaration or discretion with respect to the activities which occurred before this time because, in fact, the unlawful strike had ended prior to the date of the hearing.

15. Mr. Cavalluzzo moved at the conclusion of the applicant's case that all charges against Mr. C. Thibault be dismissed for lack of evidence. The Board agrees there is no evidence which would implicate Mr Thibault in the activities occurring during the period in question.

16. The Board finds that an unlawful strike took place commencing at approximately 4 p.m. on Thursday, October 23, 1975. Having regard to the definition of strike found in Section 1(m) of the Act:

"strike" includes a cessation of work, a refusal to work or to continue to work *by employees* in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the Part of employees designed to restrict or limit output." (emphasis added).

The Board further finds that the unlawful strike of those employees who had ceased work and/or refused to work at about 4 p.m. on October 23, 1975, ended some half hour later when the employment of these persons was terminated. The applicant cannot ask for a declaration on the one hand, the primary purpose of which is to facilitate a return to work and on the other hand not be prepare to permit the affected persons to return to work. The Board normally refuses to exercise its discretion and issue a declaration when the unlawful strike has ended prior to the hearing date. In the instant case, however, the Board finds that with respect to the respondents Tabor, Zdybal, and Klienberg, who were not terminated, the unlawful strike continued. Mr. Klienberg returned to work on Saturday, October 25 but the other two respondents remain on strike. The Board also finds that Messrs. Johnston, Rielly and Newman, officials of Teamster Local 938 supported and encouraged this unlawful strike.

17. Having made these findings based on the evidence before it the Board must decide whether in the circumstances it should exercise its discretion and issue a declaration and make whatever direction it deems appropriate. The Board has taken the position that the strike declaration is primarily an instrument to aid in the settlement of labour disputes but that it also serves to guide the parties as to their future conduct and in addition to inform the public as to the legality of certain actions. (See *National Refractories Ltd.* case 63 CLLC 16276). The discretion which the legislature has given to the Board under Section 82 is predicated upon the Board considering the matters which came before it pursuant to this section within the context of a broad Industrial Relations Policy which has as primary objectives stability and the maintenance of Industrial Peace on the one hand and the exercise of individual and collective rights and freedoms the other. It is against the backdrop of In-

dustrial relations Policy considerations that the Board exercises its discretion under section 82 of the Act.

18. There can be no doubt that the officials of Local 938 supported and encouraged an unlawful strike. Mr. MacPherson, the business manager of the Labourers union, was told by Mr. Rielly that the Teamsters supported the Picketers. In addition, the Board must infer from the fact that Truck driven by Teamster members turned away after conferring with Local 938 officials as evidence that they did so on the advice of their union leaders. And finally the fact that all of the persons on the picket line signed Teamster membership cards strongly supports an inference that Local 938 officials supported their activities. Counsel for the respondent asked the Board to give consideration to the poor quality representation given by the certified bargaining agent. The Board cannot excuse the activities of the strikers or the Teamster officials on this ground; to do so the Board would in effect be turning its back on firstly, section 60 of the Act which makes it unlawful for a trade union to "act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit", and the relief which flows therefrom, secondly on the termination of, bargaining rights provisions and thirdly on the certification provisions which permit a union to displace an existing bargaining agent during certain prescribed times. These sections are designed to balance the need for stability on the one hand with the exercise of individual and collective rights on the other. They are a corner stone of the Industrial relations policy of this province.

19. Counsel for the respondent also asked the Board to give consideration to the ongoing efforts of the Teamster officials to bring about a return to work and guarantee a secret ballot vote on the memorandum of settlement between North Queen Transport Limited and the Labourers union. It was the Teamster officials who advised their members to turn away; who in effect used the influence flowing from their duly acquired bargaining rights to exert economic pressure on the applicant company and thereby acquire support for the certification application which was filed on October 24. It is against this backdrop that the Board must look with a critical eye to the ongoing efforts of the Teamster's officials to bring about a return to work and a guarantee of a secret ballot vote. It is not inconceivable that Mr. Johnston, a union official for the better part of 16 years and his aides who are familiar with the certification procedures which exist in this jurisdiction attempted their conciliation efforts to meet self-serving ends. If the discharged employees who had signed Teamster cards were not returned to work they would not be counted as employees in the bargaining unit at the time the Teamster certification application was filed pursuant to section 7(1) of the Act. (See *Mobile Carriage and Distributors Ltd.* (1968) November M.R., 814.) The Board is not prepared, in the fact of all the evidence, to be swayed in the exercise of its discretion by the "peace keeping" efforts of the Teamster officials.

20. Turning to the respondents alternative argument, the Board has found that the unlawful strike was continued on October 24, by the respondents Klienbergl, Tabor and Zdybal and that although Mr. Klienbergl returned to work on October 25, the other two named respondents continued their unlawful activities on October 25, 26, 27 and part of October 28 and remained away from work at the date of the hearing. The return of Mr. Klienbergl on Saturday, October 25 is evidence of the employers preparedness to allow these persons to return to work. The activities of the Teamster officials were therefore in support of an unlawful strike and as such the Board has jurisdiction under section 82, to make a declaration and direction having regard to the evidence before it and the practice of the Board in these matters.

21. The unusual circumstances of this case whereby officials of a union other than the certified bargaining agent used the influence flowing from bargaining rights held elsewhere to support and encourage an unlawful strike and thereby acquire in the process, sufficient membership support for a certification application encompassing the affected bargaining unit has caused the Board to decide that it should issue a declaration and direction which will make it clear to all that such conduct is unlawful.

22. Pursuant to the provisions of section 82 of the Act the Board declares that the respondent employees Tabor and Zdybal engaged in an unlawful strike, contrary to the provisions of section 63(2) of the Act, which continued up to the date of the hearing, and that Messrs. Johnston, Rielly and Newman, officials of Local 938, International Brotherhood of Teamsters supported and encouraged this unlawful strike contrary to section 65 of the Labour Relations Act. In the circumstances, the Board directs that Messrs. Tabor and Zdybal cease their unlawful activities and refrain from any activity which would cause interference with the business of North Queen Transport Limited. In addition, the Board directs that Teamster Local 938 and its officials Messrs. Johnston, Rielly and Newman or anyone else acting on their behalf or on behalf of Teamster Local 938 refrain from supporting or encouraging the employee respondents in their unlawful strike or performing any other act which they know or ought to know as a probable and reasonable consequence of those acts would support or encourage the employees of North Queen Transport Limited to engage in or continue to engage in unlawful activity.

0853-75-U Mr. Gale Douglas Devereaux, (Complainant) v. (i) The Carpenters District Council of Toronto and Vicinity (United Brotherhood of Carpenters and Joiners of America) (ii) **Lawrence Aluminum Incorporated**, (Respondents).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members O. Hodges and J. E. C. Robinson, Q.C.

APPEARANCES: *J. G. Levine and G. D. Devereaux for the complainant; H. F. Caley and F. Leach for the respondent trade union; P. B. Pickett, Q.C. for respondent employer.*

DECISION OF THE BOARD: November 7, 1975

1. This is a complaint filed under section 79 of the Act where the complainant alleges that he was treated by the respondent trade union contrary to section 60 and section 60a of the Act. Alternatively the allegation is made that the respondent union called or authorized an unlawful strike contrary to section 65 of the Act causing him to lose three weeks salary. The respondent employer is alleged to have "counselled" the grievor to engage in an unlawful strike contrary to section 67 of the Act. The grievor requests the respondents compensate him for the amount of his loss.

2. At the outset of the proceedings counsel for both respondents raised a number of preliminary objections to the propriety of the complaint. Prior to entertaining counsels' submissions the Board requested the grievor's representative to clarify the background circum-

stances giving rise to the filing of the complaint. This request was acceded to. After a statement of particulars was submitted we advised, pending our rulings on counsels' objections, that supporting evidence would have to be adduced in the event the Board decided to proceed with the complaint.

3. The complainant is a member in good standing of the respondent trade union. On May 26, 1975 he was dispatched by his union to the respondent employer's construction project. The respondent is a party to a collective bargaining relationship with employer contractors represented by The Toronto Construction Association (hereinafter referred to as "The TCA"). The respondent employer is not a member of "The TCA" nor has it authorized "The TCA" to represent its interests with respect to its industrial relations. There is no collective bargaining agreement between the respondent employer and the respondent trade union.

4. Notwithstanding the absence of a formal collective bargaining relationship between both respondents, the employer has made an arrangement with the trade union to abide by the terms of "The TCA agreement" in the event the employer required union members on its construction projects. At all material times the respondent employer was engaged on "The CNR Project" in Metropolitan Toronto and "was plugged into" the TCA agreement in accordance with its arrangement with the trade union.

5. The grievor along with several of his colleagues was dispatched to the employer's project purportedly under "the hiring hall provisions" of "The TCA agreement". Terms and conditions of employment were governed by that agreement. Union dues were deducted from payroll in accordance with the union security provisions of the agreement. A union steward was assigned to the job site to safeguard the alleged "rights" of the employees. To all intents and purposes, the grievor was under the impression that both respondents were parties to a legitimate collective bargaining relationship.

6. Commencing on July 14th to August 5th 1975 employees employed by contractors bound by the collective bargaining relationship between the TCA and the respondent trade union engaged in a lawful work stoppage. On July 14th the grievor along with his colleagues assigned to the job were allegedly called out on strike by representatives of the respondent trade union. The respondent employer also advised that the job site was closing down for reasons attributed to the general work stoppage throughout Metropolitan Toronto. The grievor in the normal course assumed that he was participating in legitimate union activity and participated in the strike.

7. The next day the grievor attended the employer's premises at the job site to collect his salary cheque. He soon discovered that a number of members of the carpenter's union were at work on the project. There was some indication that the respondent union was attempting to get a special permit enabling the grievor to continue to work. He was told that he would be called back to work as soon as an arrangement could be worked out. The grievor was never called back. He registered for benefits under the respondent's strike fund entitling him to \$50.00 per week. He was denied unemployment insurance benefits upon registering a claim at Manpower and was equally denied SUB benefits under the terms of the expired "TCA agreement".

8. The grievor's representative argues that at all material times the respondent union by its arrangement with the employer perpetrated a fraud on the grievor. That is to say, the grievor was deceived by virtue of the respondent's representations into believing he was the beneficiary of a collective bargaining relationship of some substance. In being enticed into what was later discovered to be an unlawful strike, the grievor was denied three weeks salary. The respondent therefore is liable generally for breach of its duty of fair representation under section 60; and, particularly, for depriving the grievor of continued employment in a manner prohibited by section 60a of the Act. These provisions read as follows:

"60. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade union, as the case may be.

60a. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith."

9. The duty of fair representation is owed "employees in a bargaining unit" by their representative trade union. Under the Act a trade union may acquire bargaining rights on behalf of employees comprising a bargaining unit either through voluntary recognition or the certification procedures. In the former instance, the voluntary agreement must contain a clause where the employer recognizes the trade union as the exclusive bargaining agent of employees "in a defined bargaining unit;" in the latter instance, the Board is compelled "upon an application for certification (it) shall determine the unit of employees that is appropriate for collective bargaining..." (see sections s.6(1) and s.15(3) of the Act). Once bargaining rights are acquired for "employees in a bargaining unit" the trade union that is determined to be their exclusive bargaining agent "must not act in a manner that is arbitrary, discriminatory or in bad faith."

10. The effect of acquiring bargaining rights entitles the trade union to give the employer written notice of its desire to bargain with a view to making a collective agreement. (Section 13). A collective agreement is defined as an agreement in writing signed by the parties thereto between an employer and a trade union that represents employees of the employer containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the trade union on the employees." (See section 1(1)(e)). Every collective agreement shall be deemed to contain a clause whereby the employer recognizes the trade union party "as the exclusive bargaining agent of the employees in the bargaining unit defined therein." (See section 35(1)). The effect of entering a collective agreement is to cause the employer, the trade union and "the employees in the bargaining unit defined in the agreement" to become bound by the terms thereof. (see section 42)

11. The parties to a collective agreement may include in it provisions "for requiring as a condition of employment, membership in the trade union that is a party to or bound by the agreement." (see section 38(1)(a)). A closed shop provision such as the union hiring hall is the type of permissible clause that both employer and trade union may agree to include in

a collective agreement. Prior to the recent amendments to the Act, it was determined that a member of a trade union bound by "a hiring hall provision" negotiated by his trade union had no recourse under section 60 for its arbitrary or unfair administration. The Board ruled that having regard to the inherent nature of "the hiring hall", "it would be a forced interpretation of the word employee in section 60 for the Board to presume the contrary where the Legislature permits parties to the collective bargaining relationship under section 38(1)(a) ... to determine the very conditions upon which the employer-employee relationship may be established." (See: *The Arthur Joseph Roberts* case OLRB M.R. March 1974 169 at P. 173). In other words, the person who was the victim of the unfair administration of "the hiring hall" was without a remedy under section 79 of the Act. By amendment of the Act, the Legislature has attempted to cure what appeared to be an obvious shortcoming in the nature of the duty of fair representation by extending its scope to include unfair treatment accorded "a person" "where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of employment." (See *The Labour Relations Amendment Act* S.O. 1975 c.76, s. 16, emphasis added).

12. In the instant case, at all material times the grievor was a member in good standing of the respondent trade union. In addition, at all material times, he was also an employee on the respondent employer's job site. Nevertheless it is admitted that at no material times, he was also an employee on the respondent employer's job site. Nevertheless it is admitted that at no material times were either the respondent employer or the respondent trade union parties to a collective agreement containing a clause contemplated by section 38(1)(a) of the Act. It therefore follows that neither the employer, trade union nor the grievor were bound by any clause contained in a collective agreement governing the terms and conditions of employment (or the continued terms and conditions of employment) as contemplated under the terms of The Labour Relations Act. It seems manifestly self-evident that an aggrieved employee as a prerequisite for relief under section 60 of the Act, must establish that at the time of the circumstances giving rise to the complaint the respondent union was his exclusive bargaining agent for a unit of employees defined in either a collective agreement or a Board certificate. (see: *The George Wilson Case* OLRB M.R. March 1974 176 at p.177). We have not been satisfied that the grievor has made out a case, having regard to the admissions of fact, that he is an employee "in a bargaining unit" on whose behalf the respondent union is entitled to represent for collective bargaining purposes with the respondent employer. The complaint with respect to the alleged breach by the respondent trade union of section 60 of the Act must therefore be dismissed.

13. The Board is also of the view that the grievor has not established, having regard to the admissions of fact, that he is "a person" who "pursuant to a collective agreement", has been treated contrary to the respondent's duty under section 60a of the Act. The respondents allegedly were parties to a loose arrangement whereby the respondent union agreed to supply the employer with union members provided the latter adhered to the terms of "The TCA agreement." However cavalier and amoral this type of relationship may have appeared to the grievor, we are constrained to the conclusion that the term "pursuant to a collective agreement", was not intended by the Legislature to be interpreted in a manner inconsistent with the definition of "collective agreement" under the relevant provisions of *The Labour Relations Act*. That is to say, a collective agreement is an agreement in writing signed by the parties thereto with respect to the terms and conditions of employment and other rights, privileges and duties of the employer, the trade union and the employees. In the absence of the binding collective bargaining relationship between the employer and the

trade union as the exclusive bargaining agent on behalf of persons affected by “the collective agreement” we cannot find that a duty is owed the grievor under section 60a of the Act. To hold otherwise would compel the Board to entertain complaints pursuant to “any” collective agreement irrespective of the absence of a legitimate collective bargaining relationship between the trade union and employer parties thereto. In our view the duty was not intended to have so wide an application under section 60a of the Act. (See; *The Corporation of the Borough of North York* case OLRB M.R. July 1971 363 at pp.368 to 370 for an interpretation of the word “a” in context of “pursuant to a collective agreement”).

14. Alternatively, it is argued that the respondent union called or authorized an unlawful strike contrary to section 65 of the Act. In other words, in the absence of a collective bargaining relationship between the respondent parties the permissible time period for participating in a lawful work stoppage was absent. (See section 63 of the Act). The respondent by their conduct falsely and deceptively misrepresented that the grievor was engaging in legitimate trade union activity. As a result of this unlawful conduct the grievor incurred a loss of three weeks salary in that he would have otherwise been gainfully employed at his trade.

15. At the outset, the Board does not agree with the submission of counsel for the respondent trade union that the provisions of *The Labour Relations Act* relating to unlawful work stoppages has no relevance to a common-law master-servant relationship. The Board is of the view that the unlawful strike provisions are intended to apply broadly to employment relationships that fall under scope of the Labour Relations Act. Unless otherwise expressly excluded from the umbrella of the Act, the common-law right to engage in work stoppages has been abrogated except in the circumstances contemplated by section 63 of *The Labour Relations Act*. One particular exception was discussed in the *Board of Education For The City of Windsor v. Ontario Secondary School Teacher's Federation et al* (1975) 7 O.R. (2d) 26 at p.33 Per Osler J. who ruled that teachers falling under the jurisdiction of The Teachers Act, were expressly excluded under section 2(f) from the scope of *The Labour Relations Act*. He therefore concluded;

“...there is no statute akin to those governing labour relations which specifically proscribes strike action or indeed breach of contract.” (section 2(f) has since been amended by *The Labour Relations Amendment Act* S.O. 1975 c.76 s2)

It may safely be concluded that the grievor along with his colleagues (as employees for purposes of the Act) in the absence of proof of a “no board report” contemplated by section 63(2) of the Act may be deemed to have participated in an unlawful strike unless otherwise expressly excepted by statutory regulation. (See also – *Gagnon v. Foundation Maritime Limited* (1961) 28 D.L.R. (2d) 174 (S.C.C.) per Kerwin J.)

16. The difficulty confronting the Board is whether, even assuming the grievor engaged in an unlawful strike at the behest of the respondent trade union contrary to section 65 of the Act, the remedial provisions of section 79 of the Act provides the grievor with status for relief. The Board is satisfied that section 79 would give an employee relief if an employer or a person acting on behalf of an employer “by threat of dismissal or by any other kind of threat” deprived an employee of the right to engage in a lawful work stoppage. (See for example; *The Hydro Electric Power Commission of Ontario* case OLRB M.R. May 1969 249 at pp.259 to 261). Furthermore the Board is also satisfied that section 79 Provides a

remedy against any trade union that “suspends, expels or penalizes in any way a member because he refuses to engage in or continue to engage in a strike that is unlawful under the Act.” (See; section 69 of the Act). We are not convinced however that an employee who wittingly or unwittingly participates in an unlawful strike at the instance of his trade union is intended by the Legislature to have a remedy under section 79. To do so would permit a grievor to take advantage of his own wrongdoing notwithstanding the absence of an improper motive.

17. The Legislature has restricted a particular individual’s status to initiate unfair labour practice complaints for alleged violation of section 65 of the Act. (See; *The Windsor Construction Association OLRB M.R. May [1969] 234 at p.235*). The relevant procedural provision of the Act governing the status of persons to apply for relief is the following:

“82. Where, on the complaint of a trade union, council of trade unions, employer or employers’ organization, the Board is satisfied that a trade union or council for trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.”

An employee allegedly called out or authorized by his trade union to participate in an unlawful strike is denied status under section 82 of the Act to apply for relief. That is to say the Legislature has limited the thrust of the Act to specific persons thereby denying the unsuspecting employee status to apply for an appropriate direction or other compensatory relief. (See *CSAO National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al 72 CLLC ¶14,118 at p497 Per Jessup J.A. for the application of the *expressio unius est exclusio alterius maxim*). Indeed, it may be safely concluded that utter havoc to the collective bargaining system would ensue if legal recourse under the unfair labour practice provisions of the Act were made available to actual participants in unlawful strike activity in circumstances where ultimate responsibility may be attributed to the representative trade union.*

18. Finally, the Board in the circumstances, has discerned that “the gravaman” of the grievor’s complaint is the alleged unlawful intrusion by the respondent trade union in calling or authorizing an illegal strike thereby inducing the termination by the employer of this contract of service. This may be an actionable wrong in tort more peculiarly reserved for the exclusive jurisdiction of a court of law. (See; *Fokuhl v. Raymond* (1949) 4 D.L.R. 145 (CA) per Laidlaw J.A.). In other words, although relief from the wrongdoing allegedly committed by the respondent may be denied under the terms of the Act, it does not follow that another forum upon establishing the facts in support of the allegations would necessarily condone the respondent’s alleged activities.

19. For reasons set forth in the foregoing paragraphs, the complaint is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1975

Applications For Certification

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0583-75-R: Central Ontario District Council, L.U.'s 1304, 2480, 2482 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ball Brothers Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District of Muskoka and the Townships of Rama, Mara and Thorah in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0632-75-R: Canadian Union of Public Employees (Applicant) v. University of Ottawa (Respondent) v. The Association of Professors of the University of Ottawa (Intervener).

Unit: "all professional librarians employed by the respondent in its Library System in the City of Ottawa, save and except the University Chief Librarian, the Associate Librarian, the Assistant Librarians, the Coordinator of Collections Development, the Coordinator of Planning and Research, the Directors of the Law Library and Vanier Library, the Director of Cataloguing and the Director of Reference." (47 employees in the unit). (*Having regard to the agreement of the parties*).

0749-75-R: Canadian Union of Public Employees (Applicant) v. Belleville Utilities Commission (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in the City of Belleville save and except supervisors, persons above the rank of supervisor, secretary to the general manager, secretary to the office manager, persons regularly employed for not more than twenty four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (24 employees in the unit).

0802-75-R: Wood, Wire and Metal Lathers, International Union, Local 562 (Applicant) v. Volens Contractors Limited (Respondent) v. The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, on behalf of its affiliated Local Unions and District Councils in the Province of Ontario (Intervener).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (47 employees in the unit). (*Having regard to the representations of the applicant and the respondent*).

0866-75-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Coca-Cola Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant at Belleville, Ontario, save and except office staff, sales supervisors, foremen and persons above the ranks of sales supervisor and foreman." (22 employees in the unit). (*Having regard to the agreement of the parties*).

0884-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Western Caissons (Man.) Limited (Respondent).

Unit: "all piledrivers employed by the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the representations before it*). (The Board noted the position of the applicant that the crane operator is not included in the bargaining unit).

0890-75-R: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. New Ontario Dynamics Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Haileybury, save and except foremen, persons above the rank of foreman, quality control, office and sales staff, persons regularly employed for less than 24 hours per week and students employed during the school vacation period." (123 employees in the unit). (*Having regard to the Board's practice and the submissions of the parties*).

0914-75-R: Christian Labour Association of Canada (Applicant) v. Vision '74 Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit #2: "all employees of the respondent at Sarnia regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor and office staff." (2 employees in the unit).

(*Bargaining Unit #1 – See Application Certified Subsequent to Post-Hearing Vote*).

0933-75-R: Lumber & Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Paul Carruthers Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0961-75-R: Labourers' International Union of North America, Local 506 (Applicant) v. Guild Electric Limited (Respondent) v. Local Union 353, International Brotherhood of Electrical Workers (Intervener).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in the unit). (*Having regard to the foregoing*). (For the purposes of clarity the Board declared that an electrician or electrician's apprentice who operates an auger truck is not included in the bargaining unit).

0963-75-R: United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Cassin-Remco Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its plant in London, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (39 employees in the unit). (*Having regard to the agreement of the parties*).

1004-75-R: The Association of Allied Health Professionals; Ontario (Applicant) v. The Etobicoke General Hospital (Respondent) v. The Civil Service Association of Ontario (Inc.) (Intervener) v. Group of Employees (Objectors).

Unit: "all Occupational Therapists, Physiotherapists, Psychometrists, Social Workers, Recreationists, Discharge Planning Co-ordinators and Pharmacists in the employ of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements between the respondent and existing collective bargaining agents is a unit of employees appropriate for collective bargaining." (12 employees in the unit). (*Having regard to the foregoing, as well as the agreement of the parties*).

1009-75-R: The United Brotherhood of Carpenters and Joiners of America, A.F.L.-C.I.O. (Applicant) v. Whitby Boat Works Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Whitby, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (41 employees in the unit). (*Having regard to the agreement of the parties*). (For the purpose of ascertaining the membership position of the applicant union there were 41 persons in the appropriate bargaining unit. The applicant has submitted valid documentary evidence of union membership for 26 persons. The handwritten statement of desire signed by employees and indicating opposition to the application was signed by 22 persons but of these there were 8 where one finds an overlap with the documentary evidence filed by the applicant. Under these circumstances, it was therefore necessary for the Board to conduct the usual inquiry into the origination and circulation of the documentary evidence filed by the objectors).

1027-75-R: The Civil Service Association of Ontario, Inc. (Applicant) v. Kingston General Hospital (Respondent).

Unit: "all technologists, technicians and assistants employed by Kingston Hospital, commonly known as the Kingston General Hospital at Kingston, save and except head technologists and those above such rank, students in training, students employed after regular school hours or during the university or school vacation, employees regularly employed for not more than 24 hours per week, employees covered by subsisting collective agreements with the Canadian Union of Public Employees Local 1974; Ontario Nurses' Association Local 99 and the Civil Service Association of Ontario 046-96-01." (108 employees in the unit). (*Having regard to the agreement of the parties*).

1076-75-R: Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Orleans Builders Supplies Ltd. (Respondent).

Unit: "all employees of the respondent company at Ottawa, Ontario, in the regional municipality of Ottawa-Carleton, save and except foremen, persons above the rank of foreman and office staff." (29 employees in the unit). (*Having regard to the agreement of the parties*).

1088-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. (1) Unispec Projects Limited (2) Vido Drywall and Painting (Respondents).

Unit: "all carpenters and carpenters' apprentices in the employ of Vido Drywall and Painting in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in the unit).

1094-75-R: Canadian Paperworkers Union (Applicant) v. Morgan Adhesives of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Brampton, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.. (120 employees in the unit). (*Having regard to the agreement of the parties*).

1104-75-R: Lumber and Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Gosselin Lumber Co. Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its sawmill and planing mill at Calstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed in the respondent's bush operations, scalers and students employed during the school vacation period." (60 employees in the unit). (*Having regard to the agreement of the parties*).

1107-75-R: Ontario Nurses' Association (Applicant) v. Oxford Private Hospital and Oxford Private Hospital Annex (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Oxford Township, save and except registered and graduate nurses who are regularly employed in a nursing capacity for not more than twenty-four hours per week, director of nursing and persons above the rank of director of nursing." (2 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all registered and graduate nurses who are regularly employed in a nursing capacity by the respondent in Oxford Township for not more than twenty-four hours per week, save and except director of nursing and persons above the rank of director of nursing." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1111-75-R: United Electrical, Radio & Machine Workers of America (UE) (Applicant) v. Norglo - Division of Miami - Carey Ltd. (Respondent).

Unit: "all employees of the respondent company in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1112-75-R: Graphic Arts International Union, London Local 517 (Applicant) v. American Decalcomania Company of Canada Limited (Respondent).

Unit: "all employees of the respondent at Windsor, save and except foremen, persons above the rank of foreman, office and sales staff." (13 employees in the unit).

1113-75-R: The Hotel and Club Employees, Union, Local 299, Toronto, Ontario, affiliated with the Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. Delta's Chelsea Inn (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, sales and accounting staff, front desk staff, cashiers and management trainees.” (14 employees in the unit).

1114-75-R: Ontario Nurses’ Association (Applicant) v. The Minto Hospital At Cochrane (Respondent).

Unit #1: “all registered and graduate nurses engaged in a nursing capacity by the respondent at Cochrane, save and except supervisors, persons above the rank of supervisor, pharmacist, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (31 employees in the unit). (For the purpose of clarity, the Board noted the agreement of the parties that the Discharge Planner is included in bargaining unit #1 by reason of the fact that the category is presently occupied by a nurse).

Unit #2: “all registered and graduate nurses engaged in a nursing capacity by the respondent at Cochrane employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and pharmacist.” (5 employees in the unit).

1117-75-R: United Steelworkers of America (Applicant) v. Mac-Wood Machine Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (31 employees in the unit). (*Having regard to the agreement of the parties*).

1118-75-R: International Association of Machinists and Aerospace Workers (Applicant) v. Dover Corporation (Canada) Limited, Turnbull Elevator Division, Toronto Branch (Respondent).

Unit: “all employees of the respondent in its Metropolitan Toronto Service Store, save and except foremen, persons above the rank of foreman, office and sales staff.” (4 employees in the Unit). (*Having regard to the agreement of the parties*).

1128-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Louis Electric (Respondent).

Unit #1: “all electricians and electricians’ apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit). (*Dismissed*).

Unit #2: “all electricians and electricians’ apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*Certified*).

1132-75-R: Christian Labour Association of Canada (Applicant) v. V & C Plumbing & Heating (Respondent).

Unit: “all plumbers, plumbers’ apprentices, sheet metal workers, sheet metal apprentices and construction labourers in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof

in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

1133-75-R: Christian Labour Association of Canada (Applicant) v. Canadian Hearing Society (Respondent).

Unit: "all employees of the respondent employed at or out of its London office, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week." (2 employees in the unit).

1137-75-R: American Federation of Grain Millers (Applicant) v. Thos. J. Lipton Limited (Respondent).

Unit: "all employees of the respondent employed at its Weston Road Warehouse, save and except foremen and persons above the rank of foreman." (5 employees in the unit).

1147-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1190 (Applicant) v. Tosoni & Sons Carpenter (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (Except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1148-75-R: Plastic Workers of Windsor, Unit 1 (Applicant) v. Peerless Plastics Limited (Respondent).

Unit: "all employees of the respondent employed in the City of Windsor, save and except office staff, quality control staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (43 employees in the unit). (*Having regard to the agreement of the parties*).

1153-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Checker Cartage (Waterloo) Ltd. (Respondent).

Unit: "all employees of the respondent company working in and out of Waterloo, Ontario, save and except dispatchers, persons above the rank of dispatcher, sales and office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1166-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. James A. Rice Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Peterborough, Victoria and the Provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1167-75-R: Laundry and Linen Drivers and Industrial Workers Local 847 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Long Branch Window and Metal Cleaning Ltd. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener).

Unit: "all employees of the respondent company working at Metropolitan Toronto save and except foremen, those above the rank of foreman, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*). (For purposes of clarity the Board noted that the appropriate unit is confined to employer projects conducted in the industrial and maintenance sector).

1175-75-R: The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736 (Applicant) v. Babcock & Wilcox Canada Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1178-75-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Benbee Diving & Marine Ltd. (Respondent).

Unit: "all divers, construction labourers and all employees of the respondent in the District of Kenora, including the Patricia Portion engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the Unit). (*Having regard to the foregoing*).

1179-75-R: The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America, on behalf of Local Union 1190 (Applicant) v. Bramalea Consolidated Developments Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent working out of #1 City Centre Bramalea, at Brampton, save and except foremen, persons above the rank of foreman and office staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1182-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Towland (London) 1970 Limited (Respondent).

Unit: "all employees of Towland (London) 1970 Limited, working at respondent's shop on 2nd Street, London, Ontario, save and except foremen, persons above the rank of foreman, office and parts clerks." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1189-75-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Tellus Instruments Limited (Respondent).

Unit: "all employees of the respondent in Peterborough save and except foremen, persons above the rank of foreman, office, clerical and technical employees, sales staff, and persons regularly employed for not more than 24 hours per week." (6 employees in the unit).

1190-75-R: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Karlik Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1191-75-R: The United Brotherhood of Carpenters & Joiners of America Local Union #494 (Applicant) v. Dor-Kraft Building Materials Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1194-75-R: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Recon Carpentry (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

1204-75-R: Christian Labour Association of Canada (Applicant) v. Canadian Hearing Society (Respondent).

Unit: "all employees of the respondent employed at its regional office in Hamilton, Ontario, save and except supervisors, and persons above the rank of supervisor." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1207-75-R: Christian Labour Association of Canada (Applicant) v. Custom Glass (Ontario) Limited (Respondent).

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

1209-75-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Provincial Sanitation Services Limited (Respondent).

Unit: "all employees of the respondent at Winona, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1239-75-R: Chatham Construction Workers Association, Local #53, affiliated with the Christian Labour Association of Canada (Applicant) v. Difcon Construction Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices, cement masons and cement masons' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

1240-75-R: Bricklayers Masons & Plasterers International Union of America Local #10 (Applicant) v. Francis Engineering Ltd. (Respondent).

Unit: "all bricklayers, bricklayers' apprentices, stonemasons, stonemasons' apprentices, plasterers and plasterers' apprentices in the employ of the respondent in the Townships of Elizabethtown, Augusta, and Edwardsburgh and all lands south thereof (there are three Municipalities south of these townships: Brockville, Prescott and Cardinal) in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1261-75-R: Christian Labour Association of Canada (Applicant) v. Humber Mechanical Services Limited (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*Having regard to the foregoing*).

1275-75-R: Labourers International Union of North America Local 491 (Applicant) v. The Lunar Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0928-75-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Welland County General Hospital (Respondent) v. International Union of Operating Engineers, Local 772 (Intervener #1) v. The Civil Service Association of Ontario, (Inc.) (Intervener #2).

Unit: "all part-time employees of the Welland County General Hospital at Welland, save and except professional and technical personnel, dieticians, supervisors, graduate and under graduate nurses, office and clerical staff, persons employed for more than 24 hours per week, persons covered by existing collective agreements." (108 employees in the unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list	109
Number of persons who cast ballots	48
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	2

1119-75-R: Canadian Union of Public Employees (Applicant) v. Scarborough Centenary Hospital Association (Respondent).

Unit: "all office and clerical employees of the respondent in the Borough of Scarborough, save and except supervisors, persons above the rank of supervisor, technical personnel, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, and persons covered by subsisting collective agreements." (113 employees in the unit). (*Having regard to the agreement of the parties*). (For the purpose of clarity, the Board noted the further agreement for the parties to the effect that, "Registered Record Librarians, Unit Service Co-ordinators, the clerk typists II of personnel department and staffing office, secretaries to the Administrator, Associate Administrator, Assistant Administrator Patient Care and Assistant Administrator Finance are excluded from the bargaining unit.").

Number of names of persons on voters' list	115
Number of persons who cast ballots	103
Ballots segregated and not counted	3
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	49

Applications Certified Subsequent to Post-Hearing Vote

7330-74-R: Graduate Assistant's Association (Applicant) v. York University (Respondent).

Unit #1: "all part time employees of York University in Metropolitan Toronto registered at York University as full time graduate students employed in teaching, demonstrating, tutoring or marking." (40 employees in the unit).

Number of names of persons on revised voters list		332
Number of persons who cast ballots		90
Number of ballots marked in favour of applicant	77	
Number of ballots marked against applicant	13	

Unit #2: "all part time employees of York University in Metropolitan Toronto engaged in teaching, demonstrating, tutoring or marking, save and except persons employed in the faculty of Law, the faculty of Administrative Studies and the Department of Administrative Studies at Atkinson College, full time graduate students registered at York University; lecturers, persons above the rank of lecturer, persons whose salaries are paid from other than operating funds and persons in other bargaining units of York University." (1066 employees in the unit).

Number of names of persons on revised voters list		343
Number of persons who cast ballots		39
Number of ballots marked in favour of applicant	35	
Number of ballots marked against applicant	4	

0868-75-R: Canadian Paperworkers Union (Applicant) v. Gage Envelopes Limited (Respondent) v. Graphic Arts International Union, Local 28-B (Intervener).

Unit: "all employees of Gage Envelopes Limited, Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (131 employees in the unit).

Number of persons on revised voters list		134
Number of persons who cast ballots		122
Number of ballots marked in favour of applicant	108	
Number of ballots marked in favour of intervener	14	

0914-75-R: Christian Labour Association of Canada (Applicant) v. Vision '74 Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent at Sarnia, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit).

Number of names of persons on revised voters list		12
Number of persons who cast ballots		11
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	7	
Number of ballots marked against applicant	3	

(Bargaining Unit #2 – See Bargaining Units Certified – No Vote Conducted).

1081-75-R: Bricklayers Masons & Plasterers International Union of America, Local #4 Ontario (Applicant) v. Lucata Brothers & Company Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Number of names of persons on voters' list		4
Number of persons who cast ballots		4
Number of ballots marked in favour of applicant	3	
Number of ballots marked in favour of intervener	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0606-75-R: Union of Canadian Retail Employees, C.L.C. (Applicant) v. Tip Top Meat Market Limited (Respondent). (23 employees).

0975-75-R: International Union, United Plant Guard Workers of America, Amalgamated Plant Guards, Local 1958 (Applicant) v. Pinkerton's of Canada, Limited (Respondent). (49 employees).

1000-75-R: A Council of Trade Unions acting as the representative and agent for: 1. International Union of Operating Engineers, Local 793; 2. Labourers' International Union of North America, Local 527; and 3. International Brotherhood of Teamsters' Union Local 91 (Applicants) v. O'Leary's (1956) Limited and Curb Constructions Limited (Respondents). (no employees).

1143-75-R: Local Union 1590, International Brotherhood of Electrical Workers, A.F.L., C.I.O., C.L.C. (Applicant) v. NCR Canada Ltd (Respondent) v. Graphic Arts International Union Local 28-B (Intervener # 1) v. Warehousemen and Miscellaneous Drivers, Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener # 2). (235 employees).

1173-75-R: International Union of Doll & Toy Workers of the U.S. & Canada, Local 905 (Applicant) v. Slater Electric (Canada) Limited (Respondent). (4 employees).

1192-75-R: United Brotherhood of Carpenters and Joiners of America Local #494 (Applicant) v. Barnier Building Systems Limited (Respondent). (5 employees).

Certification Dismissed Subsequent to Post-Hearing Vote

1021-75-R: United Steelworkers of America (Applicant) v. Canadian Specialties Division: Dresser Industrial Products, Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office clerical and technical employees of the respondent company at Cambridge, save and except supervisors, persons above the rank of supervisor, salesmen, secretary to the operations manager and persons covered by subsisting collective agreements... (95 employees in the unit).

Number of names of persons on revised voters' list		95
Number of persons who cast ballots	93	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	34	
Number of ballots marked against applicant	58	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0947-75-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadian Johns-Manville Co. Ltd. (Respondent) v. Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America on behalf of Locals 1316, 1617, 1940, and 2041 (Intervener). (35 employees).

1116-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Green Giant of Canada Ltd. (Respondent). (no employees).

1131-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. G. A. Electric (Respondent). (8 employees).

1134-75-R: Service Employees Union, Local 478 AFL-CIO-CLC (Applicant) v. Sensenbrenner Hospital (Respondent). (64 employees).

1152-75-R: Teamsters Union, Local 938 affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. North Queen Transport Limited (Respondent). (30 employees).

1158-75-R: Bricklayers, Masons & Plasterers International Union of America Local #10 Kingston, Ont. (Applicant) v. Francis Engineering Ltd. (Respondent). (2 employees).

1164-75-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Dustban Enterprises Limited, Modern Building Cleaning Division (Respondent), (4 employees).

1180-75-R: London and District Service Workers Union, Local 220, S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Alexandra Hospital (Respondent). (52 employees).

1181-75-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Combustion Engineering-Superheater Ltd. (Respondent). (2 employees).

1188-75-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Upton Drywall Ltd. (Respondent). (5 employees).

1193-75-R: United Brotherhood of Carpenters & Joiners of America Local Union #494 (Applicant) v. Victor Izgherian Construction (Respondent). (7 employees).

1231-75-R1 Oil, Chemical & Atomic Workers International Union (Applicant) v. Alma Paints & Varnish Company Limited (Respondent). (10 employees).

1277-75-R: Labourers International Union of North America Local 491 (Applicant) v. Towne Acoustics & Tile Limited (Respondent) v. Ontario Acoustical and Drywall District Council on behalf of Locals 1617, 1316, 1940 and 2041 (Intervener). (2 employees).

Applications For Declaration Terminating Bargaining Rights

0822-75-R: Mr. Dan Burns on Behalf of Employees (Applicant) v. Retail, Wholesale, Hotel & Restaurant Employees Union, Local 448 (Respondent) v. York Hotel – London, Ont. (Intervener). (*Granted*).

Unit: “all full-time and part-time employees of the York Hotel – London, Ontario, employed in the ladies’ beverage room, men’s beverage rooms and lounges.” (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent	2	
Number of ballots marked against respondent	3	

0904-75-R: Keith A. Carroll (Applicant) v. The United Electrical, Radio & Machine Workers of America, and its Local 561 (Respondent). (*Dismissed*).

Unit: “all office staff of Domtar Construction Materials Ltd. Arborite Division – Vaughan Plant at its premises in Vaughan Township, save and except outside salesmen, sales co-ordinator, purchasing agent, accountant, foremen and supervisors and persons above the rank of foreman and supervisor and secretaries to managers.” (22 employees in the unit).

Number of names of persons on voters’ list		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of respondent	14	
Number of ballots marked against respondent	7	

Application For Declaration Of Successor Status

1029-75-R: United Steelworkers of America (Applicant) v. Crown Cork and Seal Company, Limited (Respondent) v. Crown Cork and Seal Employees’ Association (Predecessor Trade Union). (*Dismissed*).

Applications For Declaration That Strike Unlawful

0794-75-U: Graham Food Products, Limited trading as Hickeson-Langs Supply Company and The Ontario Food Division of the Oshawa Group Limited (Applicants) v. Warehousemen and Miscellaneous Drivers Union Local 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and S. Floyd (Respondents). (*Withdrawn*).

1123-75-U: Konvey Construction Company Limited (Applicant) v. International Union of Bricklayers Stonemasons and Plasterers Local No. 5 (Respondent). (*Direction*).

1127-75-U: Canadian Elevator Manufacturers, a Division of the Canadian Electrical Manufacturers Association (Applicant) v. International Union of Elevator Constructors and its Local 50 and James Hughes, on his own behalf and in his capacity as Business Manager of Local 50, William Morran on his own behalf and in his capacity as Business Representative of Local 50, D. Waldron on his own behalf and in his capacity as a member of the Executive Committee of Local 50 and those persons named in Schedule "A" Attached hereto (Respondents).

- and -

1131-75-U: Canadian Elevator Manufacturers, a Division of the Canadian Electrical Manufacturers Association (Applicant) v. International Union of Elevator Constructors and its Local 50 and James Hughes, on his own behalf and in his capacity as Business Manager of Local 50, William Morran on his own behalf and in his capacity as Business Representative of Local 50, D. Waldron on his own behalf and in his capacity as a member of the Executive Committee of Local 50 and those persons named in Schedule "A" attached hereto (Respondents).

- and -

1144-75-U: Canadian Elevator Manufacturers, a Division of the Canadian Electrical Manufacturers Association (Applicant) v. International Union of Elevator Constructors and its Local 50 and James Hughes, on his own behalf and in his capacity as Business Manager of Local 50, William Morran on his own behalf and in his capacity as Business Representative of Local 50, D. Waldron on his own behalf and in his capacity as a member of the Executive Committee of Local 50 and those persons named in Schedule "A" attached hereto (Respondents). (*Dismissed*).

1141-75-U: Van Horne Construction Limited (Applicant) v. Antonio Grisolia, Phillips Robichaud, Walter Cole, The Carpenters' District Council of Toronto and Vicinity representing Locals 27, 68, 1133, 1747, 1963, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of North America (Respondents). (*Withdrawn*).

1156-75-U: North Queen Transport Limited (Applicant) v. The International Brotherhood of Teamsters, Local Union 938; Roman Mosar and others as per Schedule A (Respondents). (*Withdrawn*).

1162-75-U: Acme Building and Construction Limited (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 446 (Respondent). (*Dismissed*).

1163-75-U: Acme Building and Construction Limited (Applicant) v. Mr. Graham Smith and Mr. Henry Therien (Respondents). (*Dismissed*).

1186-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Refrigeration Workers of Ontario, Local (Respondent). (*Withdrawn*).

1224-75-U: Van Horne Construction Limited (Applicant) v. Ed Stewart, Antonio Grisolia, Phillip Robichaud, Walter Cole, The Carpenters' District Council of Toronto, and Vicinity representing Locals 27, 68, 1133, 1747, 1963, 3233 and 3227 of the United Brotherhood of Carpenters and Joiners of North America and each of Locals 27, 68, 1133, 1747, 1963, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of North America (Respondents). (*Direction*).

1289-75-U: The Regional Municipality of Peel (Peel Manor Home for the Aged) (Applicant) v. The Canadian Union of Public Employees, Local 966 of The Canadian Union of Public Employees, Jack White, Bruce Sweet (Respondents). (*Withdrawn*).

Applications For Consent To Prosecute

0016-75-U: Canadian Union of Public Employees, Local 1221 (Applicant) v. T.L.C. Villa Nursing Centre and June J. Gately (Respondents) v. Simcoe Contract Services Co. (Intervener). (*Withdrawn*).

0759-75-U: J. Harris & Sons Limited (Applicant) v. Rocco Lupo, et al Robert Anderson, et al (Respondents).

- and -

0931-75-U: J. Harris & Sons Limited (Applicant) v. Rocco Lupo, et al Robert Anderson, et al (Respondents). (*Granted*).

1159-75-U: Acme Building and Construction Limited (Applicant) v. Mr. Henry Therien (Respondent). (*Withdrawn*).

1160-75-U: Acme Building and Construction Limited (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 446 (Respondent). (*Withdrawn*).

1161-75-U: Acme Building and Construction Limited (Applicant) v. Mr. Graham Smith (Respondent). (*Withdrawn*).

1187-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Refrigeration Workers of Ontario, Local 787 (Respondent). (*Withdrawn*).

Complaints Under Section 79 (Unfair Labour Practice)

0018-75-U: Canadian Union of Public Employees, Local 1221 (Complainant) v. T.L.C. Villa Nursing Centre and June J. Gately (Respondents) v. Simcoe Contract Services Co. (Intervener). (*Granted*).

0651-75-U: Damiano Pedalino (Complainant) v. Local 5595 U.S.W.A. (United Steelworkers of America) Sub District 6 U.S.W.A. Algoma Steel Corporation Limited (Respondents). (*Dismissed*).

0853-75-U: Mr. Gale Douglas Devereaux (Complainant) v. (i) The Carpenters District Council of Toronto and Vicinity (United Brotherhood of Carpenters and Joiners of America) (ii) Lawrence Aluminum Incorporated (Respondents). (*Dismissed*).

0981-75-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Catalano Produce Ltd. (Respondent). (*Dismissed*).

0985-75-U: International Ladies' Garment Workers' Union (Complainant) v. Cosa Nova Fashions (Respondent). (*Withdrawn*).

1028-75-U: Canadian Union of Public Employees (Complainant) v. The Salvation Army House of Concord (Respondent). (*Dismissed*).

1038-75-U: Teamsters Union Local 938 (Complainant) v. Airport Special Delivery Service Ltd. (Respondent). (*Withdrawn*).

1039-75-U: Teamsters Union Local 879 (Complainant) v. Capital Paving Limited (Respondent). (*Withdrawn*).

1056-75-U: Mr. Edward Dzida (Complainant) v. Local 1590 of the International Brotherhood of Electrical Workers AFL-CIO-CLC (Respondent). (*Dismissed*).

1083-75-U: Retail Clerks International Association (Complainant) v. G. Tamblyn Ltd. (Respondent). (*Granted*).

1085-75-U: Teamsters Union Local 938 (Complainant) v. Westwood Air Freight Ltd. (Respondent). (*Withdrawn*).

1099-75-U: Teamsters Union Local 938 (Complainant) v. Airport Special Delivery Service Ltd. (Respondent). (*Withdrawn*).

1125-75-U: Vinko Mikulic (Complainant) v. Quasar Electronics Canada Ltd., and United Electrical Radio & Machine Workers, Local 514 (Respondents). (*Dismissed*).

1126-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Fine Papers (London) Limited (Respondent). (*Withdrawn*).

1146-75-U: United Steelworkers of America (Complainant) v. Samco Brass Limited (Respondent). (*Withdrawn*).

1155-75-U: United Steelworkers of America (Complainant) v. Blue Giant Equipment of Canada Ltd. (Respondent). (*Withdrawn*).

1184-75-U: Lennox Lewis (Complainant) v. International Union United Automobile, Aircraft, Agricultural Implement Workers of America (U.A.W.) – Local 439 (Respondent). (*Withdrawn*).

1226-75-U: Gimondo Domenico (Complainant) v. Galco Food Production (Respondent). (*Withdrawn*).

1238-75-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Complainant) v. Daymond Limited (Respondent). (*Withdrawn*).

1254-75-U: Andrew Warren (Complainant) v. Westinghouse Canada Limited Galt Ontario (Respondent). (*Withdrawn*).

1256-75-U: Helen Warren (Complainant) v. Westinghouse Canada Limited Galt Ontario (Respondent). (*Withdrawn*).

1259-75-U: Danilo N. Cortes (Complainant) v. Westinghouse Canada Limited Galt, Ontario (Respondent). (*Withdrawn*).

1260-75-U: Tony Z. Orminski (Complainant) v. Christie's Bread Ltd. (Respondent). (*Withdrawn*).

1314-75-U: Labourers' International Union of North America Local 1081 (Complainant) v. Capital Paving Limited (Respondent). (*Withdrawn*).

Application For Consent To Early Termination of Collective Agreement

1139-75-M: International Association of Machinists and Aerospace Workers Local 235 (Trade Union) v. The Governing Council of the University of Toronto (Employer). (*Granted*).

Applications Under Section 55

6618-75-R: Union of Canadian Retail Employees, C.L.C. (Applicant) v. Zehrs Markets Limited (Respondent) v. Group of Employees (Objectors). (*Dismissed*).

0756-75-R: Warehousemen and Miscellaneous Drivers Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Provincial Fruit Company (Ottawa) Limited (Respondent). (*Granted*).

1035-75-R: Local Union 1867 of the International Brotherhood of Electrical Workers (Applicant) v. Raycot Construction Limited, Noront Construction (Respondent). (*Dismissed*).

Application Under Section 76 (Financial Statement Requested By Trade Union Member)

0438-75-M: Antoine A. Plennevaux, 120 Central Pk. Ave., S.S Marie, Ont. (Complainant) v. Jimmie Lewis – Secretary Treasurer – International Labour Union Local 1036, 114 Gore St., S.S. Marie, Ont. (Respondent). (*Terminated*).

Jurisdictional Disputes

0741-75-JD: International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Complainant) v. Canadian Pittsburgh Industries Limited, International Brotherhood of Painters and Allied Trades (Respondents). (*Withdrawn*).

1210-75-JD: Smith & Elston Company Limited (Complainant) v. Christian Labour Association of Canada and Local Union 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondents) (*Withdrawn*).

Application For Determination Under Section 95(2)

0965-75-M: Canadian Union of Public Employees, Local 1106 (Applicant) v. The Queensway General Hospital Association (Respondent). (*Withdrawn*).

Applications Under Section 112A

0780-75-M: Commonwealth Construction Company Limited (Employer) v. Labourers International Union of North America, Local 607 (Trade Union) v. Lumber and Saw Mill Workers Union, Local 2693 (Intervener).

1149-75-M: The Ontario Provincial Conference of the Bricklayers' Masons' and Plasterers' International Union of America (Applicant) v. House of Ceramics Limited, carrying on business as Ontario Floor and Wall Co. Limited (Respondent). (*Withdrawn*).

1170-75-M: Labourers' International Union of North America, Local 183 (Applicant) v. Harrison Rock & Tunnel Company Limited (Respondent). (*Withdrawn*).

1264-75-M: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. D.M.D. Triangle, Lathing & Acoustics Co. Limited (Respondent). (*Withdrawn*).

Application For Reconsideration Of Board's Decision – Certification

1130-75-R: Local Union 105, International Brotherhood of Electrical Workers (Applicant) v. Gidor Electric (Respondent). (*Request Denied*).

Application For Reconsideration Of Board's Decision – Jurisdictional Dispute

6911-75-JD: Campeau Corporation (Complainant) v. Local 598 of the Operative Plasterers and Cement Masons International Association of the United States and Canada, and Local 506 Labourers' International Union of North America (Respondents). (*Request Denied*).

Application For Reconsideration Of Board's Decision – Section 95(1)

0987-75-R: Toronto Newspaper Guild, Local 87 (The Newspaper Guild, AFL-CIO-CLC) (Applicant) v. Bargain Hunter Press (Respondent v. Group of Employees (Objectors)). (*Request Denied*).

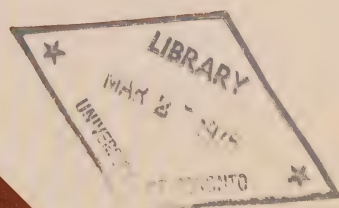


Labour
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Decisions December 75

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**A Monthly Series of Decisions from the
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CANADIAN WORKERS UNION v. CANRON LTD., EASTERN STRUCTURAL DIVISION v. SHOPMEN'S LOCAL UNION NO. 743 OF THE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS 914

1236-75-R Labourers' International Union of North America Local 1081, (Applicant) v. **Brantford Brick Ltd.**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: K.M. Burkett, Vice-Chairman, and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *A.M. Minsky and Wm. Minnery for the applicant; W.J. McNaughton, A.H. Woodnutt and P. Woodnutt for the respondent; George Barron for the Group of Employees.*

DECISION OF K. M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL. December 19, 1975

1. This is an application for certification.

3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at Brantford save and except truck drivers, foremen, persons above the rank of foreman, office and sales staff and students employed for the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The applicant submitted membership evidence on behalf of 12 of the 16 persons in the above described bargaining unit. A statement of desire in opposition to the application was filed with the Board bearing the signatures of 10 persons of which 7 "overlapped" the membership evidence submitted by the applicant. Accordingly the Board conducted an inquiry into the origination and circulation of the statement of desire in order to ascertain if it represented the true wishes of the employees who signed it.

5. Mr. George Barron appeared before the Board to give evidence as to the origination and circulation of the statement of desire in opposition to the application. The preamble of that document reads as follows:

"STATEMENT OF OPPOSITION

We the undersigned, being a group of employees of BRANTFORD BRICK LIMITED, affected by the APPLICATION FOR CERTIFICATION AND OF HEARING in which the LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL 1081 would be our certified bargaining agent, would like to state our opposition to this application. We are represented by George Barron of 165 Grand River St. N., Paris, Ont. (tel. 519-442-4633)."

Mr. Barron testified that he became aware of the union attempt to become certified in early November. On November 18, after the notice of the application had been posted he talked with some of the employees at work and that evening drafted the statement. He testified that he had assistance from no one other than his mother who typed the document. Signatures #2 and #3 were affixed to the document during the lunch break on November 19, and signatures #4, #5 and #6 in the homes of the respective employees during the evening of the same day. The home addresses of these employees were either known to Mr. Barron or were given him by other employees. Signatures #7 and #8 were affixed before work on November 20 and #9 and #10 during the lunch hour of the same day. Mr. Barron

testified that there were no supervisors present when the signatures were placed on the document. He admitted, however, that on Tuesday, November 18, he had spoken with Mr. Paul Woodnutt an executive of the respondent company, but he stated that Mr. Woodnutt had told him to look at the "green sheets" (Notice of Application-Form 5) for any information which he required. He also admitted that Mr. Woodnutt did tell him of the fifty-five per cent requirement for outright certification under the Act. He further testified that on Friday, November 21, he asked for and was granted time off work and that he used this time off to personally deliver the document to the Board. He had asked for and been granted time off in the past.

6 Under cross-examination Mr. Barron stated that he first became aware of the possibility of circulating a petition in opposition at a union meeting during which the matter was discussed. He admitted that his November 18 meeting with Mr. Woodnutt took place at the home of Mr. Woodnutt at about 7:00 p.m. that evening. There is no evidence before the Board with regard to whether he was invited, whether he called ahead or whether he simply dropped in on Mr. Woodnutt. The visit of itself is not sufficient to cast into doubt the voluntariness of the petition in light of Mr. Barron's testimony that Mr. Woodnutt referred him to the "green sheets" and generally indicated the fifty-five per cent requirement. He admitted that he told employees #2, #7 and #8 about his meeting with Mr. Woodnutt. In response to questions with respect to the drafting of the preamble Mr. Barron admitted that he had removed the "green sheets" from the company bulletin board on Monday, November 17, and had taken them to his car where he transcribed their contents before returning them. The witness was asked to give the meaning of the words "certification", "bargaining agent" and "terminal date". Having regard to his responses and to the fact that he personally copied the "green sheets" and generally to the articulation of his testimony the Board finds his testimony to be credible as regards the fact that he alone drafted the petition. In response to questions relating to his time off work on Friday, November 21, Mr. Barron testified that he works on "piecework" and therefore was not paid for the time off and that the employer did not inquire as to why he had taken the time off work.

7. The Board places an onus on those relying on a statement of desire in opposition to a certification application to have present at the hearing persons who can testify from personal knowledge as to the origination of the document and the manner in which each of the signatures was obtained and thereby prove on the balance of probabilities, that the petition is a voluntary expression of those who have signed it. See *C.C.H. Canadian Limited Case* (1974) OLRB January 19, where the Board stated at para 10:

"In certification cases the Board is called upon from time to time to consider documents filed by employees in opposition to the application. Very often these documents follow closely on the heels of evidence in support of the trade union executed by the very same people causing the Board to question the voluntary nature of the subsequent expression in light of the natural inclination to identify himself with the interest and wishes of his employer. This concern was capsulized in *Welders Public Garage Employees: Local B 417, and Pigott Motors (1961) Ltd.* (1962) 63 CLLC 16,264."

8. Frequently those relying on a statement of desire fail to meet the Board's requirements for first hand testimony as to the circumstances surrounding its origination and circu-

lation and the Board in those cases rejects the document as casting doubt on the union's membership evidence. (See *Formosa Spring Brewery Case* (1974) OLRB Rep. October at page 6931; *Wheaton Glass Case* (1969) OLRB Rep. October at page 861; *Veral and Harvey Case* (1971) OLRB Rep. November 736). In other cases, the evidence before the Board has disclosed that management has been active in promoting the petition and/or has had a direct hand in its origination and/or has facilitated its circulation. In these cases, the Board inevitably rules that the document does not represent the true wishes of the employees. In the instant case, Mr. Barron has discharged the evidential onus which attaches to the petitioners and in his case there is no probative evidence which would support a finding of active management participation.

9. There is a series of cases which stand for the proposition that even tacit approval and/or unintentional acts by management may have the effect of thwarting free expression. (See *Imperial Paving Case* (1966) OLRB Rep. July 255; *Hobart Bros. Case* (1974) OLRB Rep. February 85; *Morgan Adhesives Case* dated November 18, 1975 as yet unreported). In these situations the Board must ascertain if the employees who signed the document might logically have assumed that management supported it and would find out who signed or refused to sign it. Having regard to the principles stated in the *C.C.H. case* (supra), such circumstances would render the document not to have been a free expression of those who signed it. Usually in such cases it is not a single act which determines the matter, but the accumulative effect of a series of acts. Mr. Minsky made reference in his representations to the meetings with Mr. Woodnutt on November 18, the impunity with which Mr. Barron removed the "green sheets" and the ease with which he acquired time off. It is the finding of the Board, having regard to all of the evidence before it, that taken individually or collectively these acts did not impair the exercise of free expression. Firstly, it was Mr. Barron's evidence that only three employees (#2, #7 and #8) were told of his visit of Mr. Woodnutt's. Notwithstanding the fact that these three were told that Mr. Woodnutt refused to assist with the petition even if the Board were to determine that these three had been unduly influenced the union would remain in a certifiable position. Secondly, the removal of the "green sheets" was done without the knowledge or consent of the employer and could just as easily be construed in the mind of an employee as evidence that Mr. Barron was working independently of management as that he was not. Finally, the Board finds nothing untoward in the granting of the time off. Mr. Barron had requested and been granted time off in the past and he was not paid for the time. The granting of the time off in the circumstances of this case was not part of a pattern of management support nor could it have restricted the freedom of expression.

10. The Board is satisfied on the basis of all of the evidence before it and having regard to the credibility of Mr. Barron that the statement of desire was a voluntary expression of the employees who signed it and therefore it casts doubt on the membership evidence submitted by the applicant and accordingly the Board, pursuant to section 7(2) of the Act orders that a representation vote be taken of the employees in the bargaining unit described in para. 3 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

11. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent employer.

12. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES.

1. The testimony of George Barron makes clear to me that the employees were made aware and were influenced to change their minds about their union membership out of fear that their employer was behind Barron and his petition. Key to this conclusion is the response of Barron to the question by a Board Member "Did you tell anyone at work that you had discussed the preparation of the petition with Mr. Wodnutt?", to which Barron said "Yes - No. 2". However, when cross-examined by Counsel for the complainant on this point, Barron said he had told No. 2, No. 7 and No. 8 about his approach to Woodnutt, the plant manager. Barron visited Mr. Woodnutt at his new home on Tuesday evening before the petition heading was written. While Mr. Barron had been to visit Mr. Woodnutt before at his previous residence we do not know how he found his way to the new house. When did he talk to Mr. Woodnutt to get that address? Was he invited or did he just drop in unannounced?

2. The sequence of events leading to the drafting of the petition are significant. Barron spoke to the plant manager on Tuesday evening, November 18th and was told that the union required fifty-five per cent to get in but that everything else was on the green sheet (Form 5, Notice of Application for Certification) which had been posted in the plant on Monday. After his talk with Mr. Woodnutt, Barron went to his parent's home where his mother typed the petition heading. Mr. Barron said that his family were opposed to the union, as he was. His words were "I don't like unions".

3. Barron testified he saw the green sheet posted in the plant on Monday, November 17th. He took the green sheet from the bulletin board and copied the relevant information apparently on Monday, but it was not until Tuesday evening after a clandestine meeting with the employer that the petition was typed. Questioned in cross-examination as to why he went to the boss's house to discuss the petition Barron said "sneaky is best, as everyone knows".

4. There are sixteen employees in this bargaining unit. Three of these persons knew Barron talked to the boss about the petition. That the other thirteen employees would have learned about that before they were approached to sign the petition is a reasonable inference to be drawn. In the circumstances of this case where the petitioner is possessed of some organizational skill, is very articulate and doesn't like unions, it would be very unusual if the employees were left in doubt as to the employer's wishes, and would therefore be influenced towards signing the petition.

5. I do not consider it reasonable to believe that the employees voluntarily signed the petition. I therefore find for the dismissal of the petition and certification of the union.

0660-75-R Retail Clerks International Association, (Applicant) v. **G. Tamblyn Limited**, (Respondent).

BEFORE: George S.P. Ferguson, Q.C., Vice-Chairman, and Board Members J.E.C. Robinson, Q.C. and H. Simon.

APPEARANCES: *Chris G. Paliare and Rick Sjoerds for the applicant; R. Ross Dunsmore and John Marcinko for the respondent.*

DECISION OF VICE-CHAIRMAN G.S.P. FERGUSON AND BOARD MEMBER J.E.C. ROBINSON: December 18, 1975.

1. This is an application for certification with respect to all pharmacists, pharmacist interns and student pharmacists employed by the respondent at its retail stores in Metropolitan Toronto.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Labour Relations Act.

3. The respondent submits that the persons affected by this application who were classified as pharmacy managers and assistant pharmacy managers exercise managerial functions within the meaning of the Labour Relations Act.

4. As a result of the dispute between the parties on the status of pharmacy managers and assistant pharmacy managers, the Board appointed a Labour Relations Officer who convened meetings with the parties on September 4th and 12th, 1975. At these meetings it was agreed that two individuals would give evidence as being representatives of the duties and responsibilities of the two classifications in dispute. The report of the Labour Relations Officer is dated September 22, 1975. On November 10, 1975, the Board conducted a further hearing for the purpose of hearing representations from the parties with respect to the report of the Labour Relations Officer.

5. Based on the report of the Labour Relations Officer and the representations of the parties relating thereto, the Board finds that the pharmacy managers and assistant pharmacy managers who are affected by this application do exercise managerial functions within the meaning of section 1(3)(b) of the Act.

6. It is the Board's view that the only persons who can be included in the proposed bargaining unit would be pharmacy interns, in view of the fact that on the date of the application there were no persons classified as pharmacy apprentices, pharmacy assistants or pharmacy clerks.

7. The Board finds that all pharmacy interns employed by the respondent at its retail stores in Metropolitan Toronto, save and except persons who are regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The Board is satisfied on the basis of all the evidence before it that less than forty-five percent of the employees of the respondent in the bargaining unit, at the time the ap-

plication was made, were members of the applicant on August 5, 1975, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of the Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The application with respect to this bargaining unit is dismissed.

9. On the date of the application there was only one person classified as a pharmacy intern who was regularly employed for not more than 24 hours per week. The Board cannot, therefore, establish an appropriate bargaining unit for part-time employees.

(editors note: the dissenting reasons of H. Simon are to be given at a future date)

0883-75-R Office & Professional Employees International Union, Local #343 AFL-CIO-CLC., (Applicant) v. **Canadian Air Line Flight Attendants' Association**, (Respondent).

BEFORE: D.M. Burkett, Vice-Chairman, and Board Members F.W. Murray and O. Hodges.

APPEARANCES: Gilles Beauregard for the applicant; Robert Peck for the respondent.

DECISION OF THE BOARD: December 19, 1975

1. This is an application for certification.

3. The parties were in dispute as to an appropriate bargaining unit. There are two employees working out of the Toronto office of the respondent. The respondent argued that one exercises managerial authority and should be excluded pursuant to section 1(3)(b) and that in any event there is no community of interest between the two. Accordingly, the Board appointed a Labour Relations Officer to inquire as to the duties and responsibilities and as to community of interest and to report back to the Board. The parties subsequently made oral presentations with respect to these matters.

4. The evidence discloses that Ms. Grimwood was hired by the respondent employer on January 2, 1975, as an office secretary and was promoted to her present classification of Business Representative on March 1, 1975. The initial six months of her appointment has been designated as a probationary period. She was directly responsible to Mr. R. Smeal, Secretary/Business Manager of the employer until September 10, 1975, when he was relieved of his dual positions. She testified that subsequent to September 10, she has been responsible to Mr. Penner, the acting secretary and to Mr. Fabian the office administrator both of whom are located in Vancouver, as was Mr. Smeal, and who communicate primarily by telephone and mail. Ms. Grimwood works out of the Toronto office of the respondent along with one other person, Miss N. Campbell, the office secretary.

5. Ms. Grimwood's primary duties as a business agent of the respondent employer include the handling of grievances on behalf of CALFAA members, consultation with the

secretary and business manager with respect to the referral of grievances to arbitration, negotiation of contracts with PWA, Great Lakes and Trans-Air and assisting members with contract interpretation. It is accepted that the Air Canada Agreement sets the pattern for the union's dealings with the other airlines. She testified that these duties require her to be out of the office for about 70% of the time.

6. Miss Campbell the office secretary and the only other employee working out of the Toronto office was hired on March 13, 1975. An 'Ad' was placed in the Globe and Mail. Miss Campbell was interviewed by Ms. Grimwood on March 17, 1975, and told that initially she could commence on a temporary basis pending a decision as to her suitability by Mr. Smeal. Mr. Smeal conducted an interview a short while later, with Ms. Grimwood present, and hired Miss Campbell on a permanent basis. Both Ms. Grimwood and Miss Campbell confirm this sequence. Ms. Grimwood testified that she recommended Miss Campbell as suitable for the job but that Mr. Smeal made the decision to hire "solely on his own."

7. Ms. Grimwood in testifying with respect to her relationship to Miss Campbell stated that the vast majority of Miss Campbell's time is spent in providing clerical services to "contract chairmen" whereas about only 5% of her time is spent in providing clerical services for herself as Business representative. Ms. Grimwood stated that although they confer on certain matters such as the Wage Indemnity Plan she does not have the power 'or authority':

- to discipline
- to reprimand
- to dismiss
- to make salary recommendations
- or - to grant time off, and nor does

she register or monitor the attendance of Miss Campbell or oversee the quality of Miss Campbell's work other than the 5% or so which Miss Campbell does for her.

8. Ms. Grimwood testified that on September 19, 1975, subsequent to the filing of the certification application she was informed by Mr. Penner that she was the office manager, although she was not told what would be expected of her in that capacity. Prior to this date it was the understanding of Ms. Grimwood that she was Business Representative and that there was only one office manager, a Miss K. Thorpe, the Association Administrator located in Vancouver.

9. A number of exhibits were filed with the Board by the parties in an attempt to assist the Board in determining who held the position of manager of the Toronto office. Before examining these the Board must comment that it has never been unduly swayed by job titles in making determinations pursuant to section 1(3)(b). The Board is governed by the duties and responsibilities of the person(s) in question. It is only when certain tests with respect to duties and responsibilities prove inconclusive that the Board looks to the function in total and to the management trappings which attach to it. It is perhaps best to examine these documents in chronological order rather than in the order in which they were received. *Exhibit #9* dated April 10, 1975, is a copy of the minutes of an executive council meeting which established a salary for, "The Office Manager" and another for "The Representative in Toronto".

Exhibit #2 dated June 5, 1975, is a reprint of the CALFAA Bulletin which states in part, "Ms. Grimwood will be in charge of the Toronto Office, her primary responsibility being the representation of flight attendants with Wardair Transair and Great Lakes Airlines". *Exhibit #10* dated June 30, 1975 is a copy of minutes of an executive council meeting. The minutes state in part:

"It is understood by the Executive Council that the only office manager presently employed by CALFAA is at the headquarters of the Association in Vancouver."

Exhibits #2, #3 and #4 dated August 22, 16 and 29 respectively, are a series of exchanges between Karen Thorpe, the Administrator located in Vancouver and the Toronto office stemming from a request from Miss Campbell that the Vancouver office make and distribute approximately 27 copies of a letter written by Ms. Grimwood. Miss Thorpe requested of Miss Campbell "an explanation of your actions in this regard." Ms. Grimwood in turn replied and stated that "Nora was, in fact, acting on my directions."

10. Miss Nora Campbell testified that she was told by Ms. Grimwood that Mr. Smeal had to approve her hiring and that she was later told that she would report to Mr. Smeal.

Subsequent to the departure of Mr. Smeal she testified that:

"Yes, Mr. Korman phoned from Vancouver and informed me that I was now to report to Mr. Penner and to Karen Thorpe".

With respect to her work she stated that she had considerable contact with the various contract chairmen, that she asks Ms. Grimwood for certain information (i.e. wage indemnity plan) and "if it is something to do with my own situation in the office, well, currently I have been corresponding with Mr. Penner and Ms. Thorpe." In arranging for time off to appear before the Labour Relations Officer she herself arranged for a replacement.

11. Mr. Lloyd Penner the acting secretary of the Association was called by the respondent to give evidence. His testimony in many respects confirms that of Ms. Grimwood and Miss Campbell. He stated that Ms. Grimwood was on a 6 month training period, and he confirmed that "Ms. Grimwood's primary function is as business representative." He agreed with the description of job responsibilities given by Ms. Grimwood and Miss Campbell. In describing the responsibilities of Mr. Smeal he stated:

"Basically he would make decisions in regards to office staff, who to hire, salaries to pay them and then he would bring this up to the Executive meeting for our approval."

He then confirmed that subsequent to the dismissal of Mr. Smeal the executive council of which he is a member, "has the power to hire, fire, establish rates of pay and so on." In answer to the question, "Did you ever tell Ms. Grimwood that she had the right to hire and fire?" He replied "I can't recall whether I actually did or not ..." Although Mr. Penner did state that:

“If Miss Grimwood would come to me and say that she was not satisfied with Miss Campbell’s work, I would certainly give her permission to let her go and rehire someone else.”

The Board finds this particular evidence to be a hypothetical postulation and somewhat self-serving.

12. The applicant, in its written submission to the Board asked at Page 2 and 3 of that document that Ms. Grimwood and Ms. Campbell not be in the same bargaining unit because:

A # – # there is no community of interest between the two.

B # – # Ms. Grimwood is Miss Campbell’s boss and must be excluded from the bargaining unit as she is not an employee within the meaning of section 1(3)(b) of the Act.

C # – # Ms. Grimwood in all her duties occupies an intermediate management position and is not an employee within the meaning of section 1(3)(b) of the Act.

13. Dealing first with the submissions of the respondent with respect to the application of section 1(3)(b); section 1(3)(b) states:

“(3) Subject to section 80, for the purpose of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. R.S.O.1970, C.232, s.1.(2,3).”

The purpose of section 1(3)(b) is to ensure that persons who are within a bargaining unit deemed appropriate for collective bargaining do not find themselves faced with a conflict of interest as between their responsibilities as persons “who exercise managerial functions or are employed in a confidential capacity relating to labour relations”, and their responsibilities as members of the bargaining unit. The scheme of the Act is directed towards providing trade unions with an independent and viable existence so that they might, at arms length, represent those in the bargaining unit in their employment relations with the employer. (See Sections 5, 12, 40 and 56 of the Act.) Although the Board has developed over the years some broad guidelines and general principles for determining exclusions under section 1 (3)(b) each case must be looked at having regard to its particular set of circumstances and the purpose for which section 1(3)(b) was enacted.

14. The Board has stated:

“Unfortunately the Act contains no definition of the terms used in this section and the Board has had to proceed by deductions. One approach it has taken is to emphasize the responsibility that a person must be shouldered with in order that section 1(3)(b) apply.

To put it another way, the Board has held that a managerial function means a decision making function. The word manager connotes a person who has effective control over an organization which in turn suggests an intrinsic responsibility that would manifest itself in a form of independent decision-making.”

(See the *McIntyre Porcupine Mines Limited* case, (1975), OLRB. Rep. April at page 280.) Having regard to the broad definition quoted above and to the purpose of section 1(3)(b) as stated in para. 14, the Board must approach a determination pursuant to this section from the aspect of considering firstly the managerial function of a person with respect to the overall running or direction of an organization, and secondly, the managerial function of a person with respect to the direct supervision of other persons in the organization who are within the bargaining unit. The respondent has asked that the Board exclude Ms. Grimwood from the unit on both counts. (Submissions B and C).

15. Dealing first with the matter of persons exercising managerial function with respect to the overall running or direction of the organization the Board has stated:

“If the nature of the functions are such that they require a person to make independent decisions in meaningful matters which are of real consequence to the company’s operations rather than merely the application of expertise in technical matters, or if the person exercises his unfettered discretion concerning matters of substance in the employment relationship of other persons, the nature of such functions places him on the management side of the employee – management line,... See *Windsor Utilities* case (1971) OLRB Rep. May at page 257. (See also *Algoma* (1970) June OLRB. p.369.)

The Board has also stated in this regard:

“If the person is merely implementing a decision made by another and has little latitude to use any independent discretion except in predetermined circumscribed areas, such persons cannot be said to be exercising managerial function. If on the other hand a person has the independent discretion to formulate policy and methods or sets the necessary guidelines for others to follow such functions may properly be described as managerial functions.” See *Ontario Hydro* case, (1969) OLRB. Aug. 669 at page 674.

16. The Board finds that Ms. Grimwood does not exercise the level of independent discretion which would dictate that she be excluded from the bargaining unit. Her function as a representative requires the application of expertise in technical matters, albeit somewhat restricted by the pattern setting aspect of the Air Canada Agreement but her function does not require the formulation of policy or decision making on matters which are of real consequence to the overall management of the association. That function belongs primarily to the Executive Council and to a lesser extent to those charged with decision-making between sessions of the executive council. The Board therefore rejects submission C (para 12) of the respondent.

17. With respect to the direct supervision of persons within the bargaining unit, the Board has stated:

“If – such person has no effective control or authority over the employees in the Bargaining Unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employee ... such occasional work in no way derogates from his prime function as a person engaged in a managerial capacity.”

See the *Falconbridge* case (1966) OLRB. Rep. Sept. at p.388. (See also the *Algoma* case, (1970) OLRB. Rep. June 365). The jurisprudence of the Board clearly establishes that a person who can hire, fire, promote, transfer, discipline or discharge surely has effective control and likewise one who only instructs, reports or incidentally supervises does not. There is, of course, a broad middle ground between these two sets of circumstances and the Board when confronted with a situation which falls within the middle ground will very often look beyond duties and responsibilities to the “totality” of the function (See *McIntyre Porcupine* case, supra at p.284.)

18. In this case it is not necessary for the Board to look beyond the duties and responsibilities of Ms. Grimwood. Having particular regard to the evidence of Mr. Penner (para.11) the Board finds that Ms. Grimwood does not have effective control over the employment relationship of Miss Campbell which would require that she be excluded pursuant to section 1(3)(b) of the Act. It is the Executive Council and more particularly those designated by it to run the day to day operation of the Association (formerly Mr. Smeal and presently Mr. Penner, Mr. Fabian and Mr. Korman) who exercise real managerial function as regards the employment relationship of Miss Campbell and the respondent employer. The supervision exercised by Ms. Grimwood is infrequent and incidental to her primary responsibilities. She does not have the authority to discipline, nor was it ever indicated to her that she did. In fact Exhibit #10 establishes that even the suggestion of Ms. Grimwood’s managerial authority found in Exhibit #5 was a matter of some concern to the Executive Council (See Exhibit #10). The Board, therefore, rejects submission B (para.12) of the respondent.

19. Section 6(1) of the Act states:

Subject to subsection 1a, upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, *but in every case the unit shall consist of more than one employee* and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit. R.S.O.1970, c.232,s.6(1),c.76,s.3(1)”

(Emphasis added).

20. With respect to submission A of the respondent (para.12) the Board states that if it were to find that there is no community of interest between Ms. Grimwood and Miss Campbell both of these persons would be deprived pursuant to section 6(1) of the opportunity to participate in collective bargaining. In the past the Board has seen fit to subordinate its criteria with respect to community of interest when the adherence to these criteria would prevent an employee who has indicated a desire to engage in collective bargaining from in fact doing so. The Board refers to the *Essex County Humane Society*, case (1969) OLRB. Rep. June, 391, where in departing from the normal practice with respect to persons regularly employed for not more than 24 hours and students employed during the school vacation period, the Board stated:

“While it is the Board’s usual practice to exclude persons regularly employed for not more than 24 hours per week and students employed during the school vacation period from bargaining units of full-time employees at the request of either party, such persons are eligible to be included in a separate bargaining unit. In this case, there was only one person in the categories referred to and were that person desirous to be represented by the trade union he would be effectively prevented from being so represented if the Board were to follow its usual practice of excluding these classifications at the request of the respondent. In order that the Board be enabled to find a bargaining unit of 24 hour people and students to be appropriate, there must be two or more persons in such bargaining unit. In this case, it is the respondent’s practice to employ only one person in the classifications referred to. Having regard for the reasons given by the Board in the *H. Gray Limited* case, CCH Canadian Labour Law Reporter, Transfer Binder ’55-’59, para. 16,011, C.L.S.76-471, the Board finds that the facts of the instant case constitute a “most exceptional circumstance”. Where there is only one employee who would be eligible for inclusion in what would otherwise be an appropriate bargaining unit and where, as in this case, that employee desires to be represented by the applicant union, the Board in such exceptional circumstance should depart from its regular practice of finding a separate bargaining unit for the employee concerned. The Board should therefore include such employee in the bargaining unit in this case.”

(See also *Brinks Express Co.*, case (1970) OLRB Rep. July, 502). The Board also refers to the *Vermilion Bay Co-operative Limited* case (1970) OLRB Dec.920 where in departing from the Board’s normal practice with respect to office employees the Board stated:

“The employees affected by this application for certification consist of seventeen persons employed in the respondent’s store and an Accountant who is the only full-time office employee. For the reasons stated in the *H. Gray Limited*, case 55 CLLC para.18,011, C.L.S.76-471, it is the Board’s usual practice to place office employees in a bargaining unit separate and apart from the other employees except in most exceptional circumstances. One of the exceptional circumstances which has caused the Board to depart from its usual practice is the factual situation in the present case where there is only one full-time employee in an

office who would be eligible for collective bargaining and who is claimed by the applicant as a member. In these circumstances, the Board has included such an office employee in the same bargaining unit as other employees because he would otherwise be deprived of his opportunity to participate in collective bargaining with his employer which he has indicated he desired.”

21. Having regard to the circumstances of this case even if the Board were to find that there is no community of interest the Board would not be prepared on that ground to deny Ms. Grimwood and Miss Campbell the opportunity to partake in collective bargaining. It is not necessary, therefore, for the Board to consider written submission A or the oral submissions of Mr. Peck in this regard other than to state without making a finding, that a lack of community of interest as argued in this case would not be sufficient to deny to Ms. Grimwood and Miss Campbell the opportunity to bargain collectively under the Labour Relations Act.

22. Accordingly, in the circumstances of this case, the Board finds all clerical employees and business representatives of the respondent in the municipality of Metropolitan Toronto to be a unit of employees of the respondent appropriate for collective bargaining.

23. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 18, 1975, the terminal date fixed for this application and the date which the Board determines under section 92(2)-(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant.

1287-75-R Teamsters, Chauffeurs, Warehousemen and Helpers Local 880
 Affiliated with the International Brotherhood of Teamsters, Chauffeurs,
 Warehousemen & Helpers of America, (Applicant) v. **H.O. Trerice Co.**,
 (Respondent).

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members J. D. Bell and F. J. O’Keeffe.

APPEARANCES: *I.J. Thomson for the applicant; Frederick S. Greiner Jr. and William J. Hyslop for the respondent.*

DECISION OF THE BOARD: December 15, 1975

1. This is an application for certification in which the respondent submitted that the Board lacked jurisdiction to proceed with the hearing because of failure to properly serve the respondent with the requisite documents. This failure, it is argued, must render the pro-

ceedings a nullity. The respondent alleged that service was attempted to be made in an unsealed envelope by an unknown person on an unattended desk in the respondent's office at Windsor. The respondent argued that the service did not comply with the provisions of section 4(2) or section 50(2) of the Board's Rules of Procedure.

Section 4 (2) provides:

"The registrar shall serve the respondent with:

- (a) a copy of the application;
- (b) a notice of application and of hearing in Form 3, or a notice of application in Form 4, as the case may be, and
- (c) an appropriate number of notices of application in Form 5 or 6 as the case may be, for posting. R.R.O. 1970 Reg 5.4."

Section 50 (2) provides:

"Where a document is required to be served by these Rules, the service may be made

- a) in person; or
- b) by mail addressed to the recipient at his address for service or his last-known or usual address or at his principal office or his place of business, referred to in an application, complaint, intervention or reply in the proceeding. R.R.O. 1970, Reg. 551, s. 50 0. Reg. 474/71, s. 1.

2. It is clear by the admissions of the respondent that the envelope in question contained, inter alia, the documents mentioned in the Rules of Procedure. It is equally clear that the documents came into the hands of the management of the respondent on November 21st, 1975.

3. In a letter to the Board dated November 25th, 1975, the respondent stated:

"Pursuant to your instructions, we herewith enclose the following in connection with the above captioned matters:

- 1. Form 47, duly completed, dated and signed.
- 2. Form 9, (three copies) duly completed, dated and signed.
- 3. Schedules A, B, C, D (one copy each) duly completed.
- 4. Photo copies of signatures of employees whose names appear on the list referred to above, taken from TD1 forms.

This letter, plus enclosures are being forwarded to you this day by us, using the services of Purolator Courier Service."

4. The letter makes no reference to prejudice by reasons of the manner in which the documents were delivered.

5. While it may well be that service of the documents upon the respondent did not precisely follow the Rules of Procedure, it cannot be denied that the respondent in fact received all necessary documents and that it has not been prejudiced in any way in the preparation of its Reply. The purpose and object of the Rule with respect to service have been met in a way which enabled the respondent to make a full and timely reply to the application. The motion of the respondent for dismissal on the grounds of lack of proper service is accordingly denied.

6. The Board further finds that all employees of the Company at Windsor, Ontario, save and except office and sales staff, foremen, and persons above the rank of foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 28th, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92 (2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7 (1) of the said Act.

8. A certificate will issue to the applicant.

0641-75-R United Cement, Lime & Gypsum Workers' International Union and its Local 219, (Applicants) v. **Canada Cement Lafarge Ltd. and Point Anne Quarry Company**, a division of Standard Industries Limited, (Respondents) v. Christian Labour Association of Canada, (Intervener).

BEFORE: T. E. Armstrong, Q.C., Chariman, and Board Members L. Hemsworth and H. Simon.

APPEARANCES: *J. Sack for the applicants; no one for the respondent Canada Cement Lafarge Ltd.; R. Statton and J. Wray for the respondent Point Anne Quarry Company, a division of Standard Industries Limited; W. R. Herridge, Q.C., and B. Breems for the intervener.*

DECISION OF THE BOARD: December 16, 1975

1. This is an application under section 55 of *The Labour Relations Act*. The applicants assert that in November 1974 Canada Cement Lafarge Ltd. (hereinafter referred to as "C.C.L.") sold its business, or a portion thereof, at Point Anne, Ontario, to Standard Industries Limited (hereinafter referred to as "Standard"). By way of relief, the applicants seek an order declaring that, as a consequence of the alleged sale, they are the bargaining agent of certain employees of Standard at its quarry at Point Anne and that a collective agreement entered into the 26th day of June, 1973 between the applicants and C.C.L. is binding upon Standard.

2. The facts are not in dispute. C.C.L. was incorporated under federal charter in 1927. It is engaged in the manufacture and sale of Portland cement at various locations across Canada. For some years prior to September 1973, it operated a large cement plant at Point Anne near Belleville, Ontario. The applicants have held successive collective agreements covering C.C.L.'s production and maintenance Personnel at Point Anne. The last such agreement became effective July 1, 1973 and expired June 30, 1975 – some three weeks prior to the date upon which this application was made.

3. Until September 1973, C.C.L. carried on its cement manufacturing operation on a two-thousand-acre site at Point Anne. Its facilities included three large kilns, a laboratory, a machine shop, various mills, three large stock-houses, office buildings, garages and connecting rail lines. In addition, there is a large quarry on the site where the company mined limestone and converted it into gravel and crushed rock for use in the mining or extraction operation. The equipment used in the mining or extraction operation included a crusher conveyor and primary and secondary crushing equipment. The cement produced by C.C.L. at Point Anne was shipped to customers across Canada and beyond by means of highway transport, rail and ship. C.C.L. sold no raw aggregate. Its only product for commercial sale was Portland cement.

4. In 1973, owing to a pollution problem, C.C.L. was required to close its operation at Point Anne. In anticipation of the shutdown, it acquired property at Bath, Ontario, some thirty miles from Point Anne, where it commenced construction of a new sixty-million-dollar cement plant, equipped to produce the same range of products produced at Point Anne. The move to Bath was completed in September 1973. Except for the research laboratory, which services C.C.L.'s entire Canadian operation, C.C.L. abandoned the Point Anne site, all its employees (other than the laboratory employees) were moved to Bath and the production was continued, apparently without interruption at the new site. It appears that the Bath operation commenced prior to the final shutdown at Point Anne and that there was a transitional period when operations were being carried on at both sites. In any event, on June 26, 1973, the applicants entered into a collective agreement with C.C.L. covering its production and maintenance employees at Bath, effective July 1, 1973, and expiring July 1, 1975.

5. In October 1973, C.C.L. entered into an agreement with Standard Machine and Equipment Company and Associates (hereinafter referred to as "S.M.E.") wherein S.M.E. undertook to remove "all machinery, equipment and other material" from the Point Anne site and to "level all buildings and foundations, and rough grade, so as to totally clear the site". We were not given full particulars of this agreement. It was, however, established that S.M.E. paid a sum of money to C.C.L. in return for the salvageable equipment on the site, other than equipment removed by C.C.L. for use in certain of its other operations. Subsequently, S.M.E. sold the salvageable equipment to purchasers "all over the world". Some of the equipment was sold to Standard (see paragraph 7 below). The demolition operation commenced in the late fall of 1973 and was still proceeding at the date of the first hearing of this application on August 8 last.

6. Standard (formerly Standard Paving and Materials Limited, incorporated by provincial charter in 1929) was created by Certificate of Amalgamation issued under *The Business Corporations Act* in 1973. Its annual return describes its undertaking as "construction and construction materials". In January 1974, it entered into negotiations with C.C.L. for

the use of the Point Anne site. On April 30, 1974, an agreement between Standard and C.C.L. was concluded, whereby Standard acquired a thirty-year exclusive licence to "purchase material for commercial aggregates in situ in the ground" at Point Anne quarry, upon payment to C.C.L. of a royalty, based upon a sum calculated with reference to annual tonnage, shipped by Standard from the site. To carry out the mining and crushing operation, Standard acquired the right to occupy and use certain designated areas, to install, maintain and operate equipment and facilities for processing and handling materials, and to use existing rail tracks on the property. C.C.L., for its part, reserved the exclusive right to occupy its research laboratory and two garage buildings. On May 8, 1974, the Board of Directors of Standard approved the transaction.

7. Standard did not commence its operations at Point Anne until November or December of 1974. The delay was apparently occasioned, in part, by the demolition activities of S.M.E. However, in the spring of 1974, Standard bought certain equipment from S.M.E., some for use at Point Anne and some for use in its other operations in Ontario. For the Point Anne quarry, it acquired crushers, a conveyor, hammer mills, bins, scales, a transformer, silos, and related equipment for a total price of \$265,000. Standard purchased one shovel from C.C.L. in Woodstock and transported it to the site. Most of the equipment acquired by Standard from S.M.E. was already in place at the site, although some of it was submerged, or partially submerged, in the floor of the quarry, which had flooded following C.C.L.'s departure. Some of the equipment (the secondary screening facilities) had to be rebuilt by Standard; some has been abandoned; and some (the primary hydraulic braker, haulers, a portable conveyor, bins etc.) has been added. The wiring has been modified to comply with appropriate standards.

8. All of the aggregate produced by Standard is sold, on a retail basis, to contractors engaged in road-building and other construction work. According to the evidence, none is sold to C.C.L. Standard produces no cement. Apart from the rights acquired by Standard under the agreement of April 30, 1974 (and the one shovel purchased from C.C.L. in Woodstock), Standard acquired no other property, real or personal, directly from C.C.L. C.C.L. was not involved in the purchase transactions between Standard and S.M.E.

9. Certain corporate connections between C.C.L. and Standard were established. C.C.L., through a wholly owned subsidiary called Can Forge Limited, holds 49.9 per cent of the 3,147,888 issued common shares of Standard. These shares were originally purchased by C.C.L. on the open market some ten or fifteen years ago and were transferred to Can Forge Limited five or six years ago. Two of Standard's directors have some connection with C.C.L.; J. B. Hanly is a consultant to, and former Vice-President of, C.C.L.; P. Jongeneel is a senior Vice-President and the Treasurer of C.C.L. Neither Hanly nor Jongeneel are directors of C.C.L. Both hold shares in Standard. However, their shares are held in their personal capacities, not in trust or under power of attorney on behalf of C.C.L. or any other firm or person. The shares of Standard held by C.C.L., together with those held by Hanly and Jongeneel personally, exceed 50 per cent of Standard's issued common shares. It may also be noted that neither Hanly nor Jongeneel participated in the decision by Standard's Board of Directors to approve the agreement of April 30, 1974 between Standard and C.C.L.

10. The applicants based their case solely on the submission that the transaction, viewed as a whole, constitutes a sale by C.C.L. of its business (or a portion thereof), formerly carried on at Point Anne, to Standard. In the original application, the applicants

sought, apparently in the alternative, a direction pursuant to section 1(4) of the Act. However, at the hearing, this claim was abandoned. In support of his submission that a sale had occurred, counsel for the applicants relied on the acquisition by Standard of a substantial quantity of equipment formerly owned and operated by C.C.L. at the Point Anne site. He contended that C.C.L. was in the business of mining and crushing limestone and argued that the mere fact that its ultimate product was cement did not materially distinguish C.C.L.'s operation from Standard's. He relied, as well, on Standard's acquisition from C.C.L. of an exclusive, long-term licence to mine and process limestone on the site. The combined effect of these facts – the acquisition of equipment, the licence to use the property, and the similarity of the nature of the operation – led irresistibly, it was argued, to the conclusion that a sale within the meaning of section 55 had occurred. That conclusion, it was said, was fortified by the close intercorporate relationship between C.C.L. and Standard. In support of the latter contention, reference was made to the *D.H.I. Limited* case, OLRB M.R. August 1964, p. 237, and the *Dellelce Construction and Equipment and Dell Construction (Sudbury)* case, OLRB M.R. January 1972, p. 60. Counsel discounted the significance of S.M.E.'s role as an intermediary in the disposal of the equipment, arguing, on the basis of the *Trenton Riverside Dairy Products Limited* case, 64 CLLC ¶16,010, that a sale could be effected by a series of sequential transactions.

11. The respondent and the intervener denied that a sale had occurred. Both contended that the mere acquisition of a licence of finite duration to use a portion of the predecessor's property, coupled with the acquisition from a third party of a relatively insignificant quantity of equipment previously owned by the predecessor, did not constitute the acquisition of a business – especially where the business of the alleged successor was different from that of the predecessor. Particular emphasis was placed on the fact that Standard did not produce cement; that, unlike C.C.L., Standard was engaged in the production of construction aggregate for retail sale, and that its customers and market were entirely different than C.C.L.'s. It was denied that the corporate relationship between Standard and C.C.L. was relevant to the issue of whether a sale had occurred. The suggestion, implicit in the applicants' argument, that the interposition of S.M.E. as a sales agent was a subterfuge to mask the true nature of the transaction was denied by the respondent. In fact, it was argued, C.C.L. had moved its entire business to Bath, and any inference that it wished to evade, or to assist a related company to evade, an existing bargaining relationship was negated by the fact that C.C.L. had extended voluntary recognition to the applicants at the Bath site, even though it was under no obligation to do so.

12. None of the cases cited to us nor any of the authorities which we have been able to locate are identical to the unique fact situation disclosed by the evidence. It is true, as counsel for the applicants suggest, that a close corporate connection may sometimes support the inference that a particular transaction is designed to circumvent the operation of section 55 of the Act. Such was the Board's conclusion, for example, in *Clark Dairy Limited, Lark Cartage Limited*, OLRB M.R. August 1970, p. 601, and in *Dellelce Construction and Equipment*, *supra*. However, in both cases, the artificiality of the transaction was manifest. In *Clark Dairy Limited*, it was conceded that the successor, Lark Cartage Limited, was created for the express purpose of carrying on Clark's delivery business during a legal strike. The subterfuge in the corporate transaction in *Dellelce* was even more blatant.

13. The Facts in the instant case are quite different. Briefly put, a pollution problem forced C.C.L. to vacate its Point Anne site. While the site was abandoned the the plant and

facilities dismantled, C.C.L. retained its business and moved it, as a going concern, to Bath. What was left was an unextracted natural resource – limestone – and certain mining equipment. While there was inherent in the property and the existing equipment potential for a new business, the *particular* business of C.C.L. was retained by it and transferred to a new site.

14. In certain limited circumstances, it may be that a business is inextricably linked with a particular physical location. Thus, in a series of retail food store cases, the Board has held that goodwill and custom attaches to store premises and that a lease or sale of such premises may, alone, be sufficient to constitute the seal of a business under section 55 of the Act: see, for example *Dutch Boy Food Markets (Kitchener Food Market Ltd.)*, 65 CLLC ¶16,051; *L. & M. Food Market (Ontario) Ltd.*, OLRB M.R. September 1965, p. 440; *Leader's Clover Farms Food Market*, OLRB M.R. November 1966, p. 636. Even in the supermarket cases, however, this presumption may be defeated if, for example, the alleged successor remains in a competitive business within the same market area, as was the case in *Sunnybrook Food Market*, OLRB M.R. October 1966, p. 531. In one recent supermarket case – *Zehrs Markets Limited*, OLRB M.R. May 1974, p. 331, considerable emphasis was placed by the Board on the fact that there was “no continuum of the enterprise” between the alleged Predecessor, Busy B Discount Foods Limited, and the successor, Zehrs Markets Limited. The Board noted that there was a six-or-seven month hiatus between the shutdown of the store by Busy B and its rental by Zehrs. The Board reasoned that, in the retail food industry, where it is recognized that the goodwill of the business inheres in the actual premises, the lapse of time is particularly significant. Whatever may be the situation in the retail food industry, we do not believe, in the instant case, that any significance attaches to the fact that the property lay dormant for over one year. To hold that in every case there must be a continuation of the sort alluded by the Board in the *Zehrs* case would be to invite deliberate discontinuation for the purpose of evading the impact of section 55 of the Act.

15. In any event, we do not believe that the *Dutch Boy Food Markets* line of cases is applicable. It may be that, in some circumstances, the transfer by sale, lease or other manner of disposition of a mining property will give rise to the presumption of a sale of a business conducted on the particular property because of the inherent characteristics of the undertaking: e.g., the location *in situ*, of the raw product, of fixed equipment, etc. However, where the mine is capable of more than one use, where the acquiring party puts it to a use different, in material respects, from the use made of it by the previous occupier, and where, as here, the previous occupier moves its own business to a new site, any such presumption is rebutted.

16. Finally, it may be useful to consider the remedial purpose of section 55. Prior to the enactment of section 47a (now section 55) in 1963, the purchaser of a business or enterprise acquired it unencumbered by existing bargaining rights. The enactment of section 47a was designed to ensure that bargaining rights should not be subject to defeat by the sale of a business. A later amendment reflected the Legislature's view that at least as important as the institutional rights of the bargaining agent are the individual rights of the employees covered by the collective agreement. Accordingly, in 1970, section 47a was amended to provide that the collective agreement itself (where it was in force) survived a sale, and was binding upon the successor employer.

Here, neither the bargaining agent nor the employees within the C.C.L. bargaining unit have been affected by the alleged sale. The reason for this is that, on a proper construction of the facts, the business was not sold but was moved to a new location with bargaining rights voluntarily extended to the applicants and individual employment opportunities given to persons formerly employed at the Point Anne site. To go further, as the applicants suggest, and hold that their bargaining rights attach to any business which may be commenced at the former site would be to give a meaning to section 55 which, in our view, was not intended by the Legislature. Having regard, therefore, to the mischief rule of statutory interpretation (see *Heydon's Case*, 76 E.R. 637, cited in *Trenton Riverside Dairy Products* case, *supra*), we are fortified in our view that the relief which the applicants request must be denied.

17. The evidence established that in December 1974 the intervener was certified by this Board as the bargaining agent for a defined unit of employees of Standard (Board File 6941-74-R). It was further established that, at the time of certification, Standard employed only three Persons; that in January 1975 the work force had increased to ten, and that as of the date of the original hearing of this application on August 8, there were twenty-five or thirty persons employed by Standard at the Point Anne site. Counsel for the applicant argues that both the certification and the collective agreement between Standard and the intervener, entered into in January 1975, were premature. In these proceedings, he contends that the conduct of Standard and the intervener, in failing to make full disclosure as to the applicants' alleged interest in the matter, together with the manifest prematurity of the certification proceedings, is relevant in deciding whether a *bona fide* sale occurred. In effect, counsel argues that these facts support the inference that the entire transaction was a colourable device to which Standard, C.C.L. and, presumably, the intervener, were parties, the primary purpose of which was to defeat the applicants' bargaining rights. For reasons similar to those set out in the *Dellelce* case, *supra*, it is argued that we should conclude that the sale of a business has occurred, set aside the existing collective agreement between Standard and the intervener, and affirm the continuation of the applicants' bargaining rights.

18. We are unable to draw the inference suggested by counsel for the applicants. For one thing, the only evidence before us relates to the number of employees at the date of the intervener's application for certification (3), the date that the collective agreement between the intervener and Standard was entered into (10), and the date of the first hearing of this application (25 or 30). It may be, as counsel suggests, that these figures raise a strong presumption that the application was premature. That, however, is a matter to be dealt with in Board File 0640-75-R, in which the applicant contends that the Board should reconsider its decision in Board File 6941-75-R, revoke the certificate issued to the intervener on December 12, 1974, set aside the collective agreement between Standard and the intervener concluded in January 1975, and certify the applicant. However, in these proceedings, we heard no evidence concerning the conduct of the parties before the Board in Board File 6941-74-R. It may be, as counsel for the applicant suggests, that neither Standard nor the intervener disclosed the fact that the applicants had a previous bargaining relationship with C.C.L. at Point Anne – although we have no evidence to support that assertion. However, in view of our conclusion in these proceedings that a sale did not occur within the meaning of section 55 of the Act, it necessarily follows that the applicants' bargaining rights at Point Anne terminated when C.C.L. closed down its operations at that site in September 1973. Accordingly, in the light of this finding, it should now be clear that the intervener and Standard had no obligation to refer to the applicant's previous bargaining rights with C.C.L. at Point

Anne. The question of alleged prematurity will, of course, be entertained by the Board in Board File 0640-75-R when it is relisted for hearing.

19. In the result, this application is dismissed.

1272-75-R Pattern Makers League of North America Toronto Association, (Applicant) v. **Toronto Pattern Works Ltd.**, (Respondent).

BEFORE: K. Burkett, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Ian Springate and Paul Storrie appearing for the applicant; Roy C. Filion and Harry Freedman appearing for the respondent.*

DECISION OF THE BOARD: December 9, 1975

1. This is an application for certification.
2. The respondent company challenged the status of the applicant as a trade union under section 1(1)(n) of the Act. The Board has found the applicant to be a trade union within the meaning of the act in previous hearings dating back to 1956 and as a result there is on file a Certificate on the status of the applicant trade union dated November 13, 1975 which has been signed by the registrar.
3. Section 94 of the act states:

“Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union within the meaning of clause n of subsection 1 of section 1, such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.”

The legislature has taken account of the fact that in the normal course a viable trade union continues as a viable trade union. A requirement for fresh oral testimony in each succeeding case after status has been proved would be inordinately time consuming and would place an onerous burden on trade unions to have witnesses present at all certification hearings in order to reprove status. Furthermore a requirement to reprove status might lead to labour relations instability if technical defects in one case were to bring into question the viability of the trade union in what might well be numerous other bargaining agency relationships establishes subsequent to the initial proving of its status.

4. For sound industrial relations considerations therefore the certificate on the status of the applicant trade union is *prima-facie* evidence of its status pursuant to section 94 of the act. This is not to say, however, that the evidence of the applicant's status as embodied in the certificate can not be attacked and shown to be deficient to the extent that the Board, in the absence of countervailing evidence, will rule that the trade union no longer has status pursuant to section 1(1)(n). In the fact of section 94 it follows however, that an onus at-

taches to the respondent to support by credible and meaningful evidence its allegations with respect to the status of the applicant. See the *Zeller's Limited* case (1970) OLRB rep. Nov. at page 815 where the Board stated:

"It should be clearly understood, however, that a mere allegation unsupported by probative evidence which will substantiate any such challenge will not be sufficient to rebut the prima facie evidence of the applicant's status as a trade union or the presumption with respect to the right of the applicant under its constitution to take into membership the employees of the respondent in the bargaining unit."

5. Four exhibits were admitted into evidence. The first was a collective agreement between the applicant union and the respondent company dated June 11, 1965 (Exhibit #1), the second the renewal agreement dated February 1, 1968 (Exhibit #2), the third a letter dated July 4, 1969 to extend the renewal agreement (Exhibit #3) and the fourth a letter dated August 13, 1970 to further extend the renewal agreement (Exhibit #4). Mr. R. Fillion, representing the respondent stated that he would prove that the applicant trade union "dissipated" itself subsequent to the second renewal letter. Before calling evidence he stated that a search of the Board files revealed that the only document on file which related to the applicant union's status was entitled "Laws of Pattern Makers League of North America", dated October 1, 1962. There is no statutory requirement for a trade union to keep on file with the Board an updated copy of its constitution and by laws and a declaration as to its officers although the Board may direct a trade union to file such documents pursuant to section 75 of the act. The absence of these documents does not in any way cast a shadow upon the *prima facie* evidence of trade union status represented by the certificate.

6. Mr. Robt. Myatt the vice-president of the respondent company was called to give evidence in support of the respondent's allegation that the applicant union had "lost" its status and was not a trade union under section 1(1)(n) of the act. He testified that he had been with company for seven years; in a managerial capacity for approximately the last four years. He testified that the company had not had any dealings with the respondent union since renewing, by letter dated August 13, 1970 (Exhibit #4), the agreement entered into on February 1, 1968 (Exhibit #2) and that the person who represented the union in its dealings with the company, Mr. John L. Craig, a longtime employee of the company and treasurer of the union, was now semi-retired and had not been replaced as union representative. He further testified that historically his company set the settlement pattern with the union and that the other firms in the Toronto area followed. He asserted, on the basis of a canvas of representatives of these other companies, that the union had not been active in pursuing its bargaining rights in these other companies. This assertion however, is hearsay evidence which the Board finds has no probative value. Mr. Myatt admitted in cross-examination that he did not know what Mr. Craig, the semi-retired union representative, did outside the work place and that in fact he "could be" a union officer today.

7. In establishing its status a trade union must prove that it is an organization of employees as evidenced by a constitution, by-laws or charter which has been ratified by its members and which has as an object the regulation of relations between employees and employers. In addition, it must show that as an organization it has duly appointed officers who can carry out its objects. In effect it must prove that it is a viable entity for purposes of collective bargaining. (See *York University* case, (1975) OLRBREP. Feb. p. 127; *Alcan Univer-*

sal Homes(1969) OLRBREP. Apr. p. 55; *Underwater Gas Dev. Ltd.* (1967) OLRB REP. Sept. p. 555).

8. In rebutting the prima facie evidence of the certificate a party is expected to adduce probative evidence which calls into question the validity of the Board's earlier decision to confer trade union status. The evidence should go to the factors considered by the Board in conferring trade union status which are listed in the preceeding paragraph and elaborated on in the cases cited therein. The evidence before this Board relates solely to the inactive relationship between the respondent company and the applicant union. At a point in time subsequent to the initial conferring of status when the trade union may well have numerous collective bargaining relationships it is incumbent upon the party questioning its status to call evidence which goes beyond the lapse of particular bargaining rights if it is to rebut the prima facie evidence which is before the Board.

9. The respondent argued that based on the evidence before it the Board should follow the *Albright Platers Limited* case (1972) OLRB Rep. Aug. 784 and rule that the union "has dissipated and in effect gone out of existence". In making that finding the Board in the *Albright* case had evidence before it which showed that:

"They have no union meetings, there are no books or records, there have been no union elections, no notification of collective agreements, there appears to be no funds, and the person who appears as the vice-president of the union and the signatory to the collective agreement in 1971 appears to have left the company sometime in 1968". (para. 3)

Accordingly in that case the Board ruled that a collective agreement purported to have come into effect in 1971 was not a bar to a certification application because the intervener association was not a trade union within the meaning of the act.

10. Having regard to the evidence before it, the Board prefers the *Dutch Laundry and Dry Cleaners Ltd.* case (1968) OLRB Rep. Apr. p. 45 wherein,

"The evidence called by the applicant in support of its charges, indicates that provisions of the collective agreement dated January 5, 1965 have not been complied with and that there have been no meetings of the union for some period of time. Further, the evidence as to the manner in which employees acquired office in the union leaves much to be desired..." (para 10)

The Board went on to say in the next paragraph:

"we have no hesitation in saying that the evidence of the operations of the Dry Cleaners of London reflects poorly on the quality of the representation provided to the employees..."

However because dues had continued to be deducted and were deposited the Board found that:

“... the applicant has failed to discharge the onus upon it of satisfying the Board that the Dry Cleaners of London has ceased to be a trade union or that the Dry Cleaners of London has abandoned its bargaining rights.”

Likewise in the case at hand the Board has evidence before it which reflects poorly on the quality of representation afforded by the applicant to the employees of the respondent. Such evidence might well support an application brought by the respondent pursuant to section 51 of the Act for termination of bargaining rights. In bringing a fresh application for certification however, the applicant is admitting that it has slept on its bargaining rights in respect of the employees of the respondent employer. The applicant does not admit however, nor can the Board infer from the evidence before it, that it has lost its status as a trade union.

11. Accordingly, the Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

12. Having regard to the agreement of the parties, the Board finds that:

“all patternmakers and patternmakers’ apprentices in the employ of the respondent in Metropolitan Toronto, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.”

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 25, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

7390-74-R Canadian Workers Union, (Applicant) **V. Canron Ltd., Eastern Structural Division**, (Respondent) v. Shopmen’s Local Union No. 743 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Intervener).

BEFORE: Frank V. Boscarior, Vice-Chairman, and Board Members P. J. O’Keeffe and J. E. C. Robinson, Q.C.

DECISION OF THE BOARD: December 10, 1975

1. During the course of the initial hearing in this matter on April 24, 1975, the Board directed that proceedings be adjourned in order to permit Mr. McDermott, counsel for the

respondent, to present a motion before the Supreme Court of Ontario to compel the attendance of Mrs. Caroline Perly and Mr. Gregory Keilty upon their refusal on the advice of their counsel Mr. Endicott, to testify before us in answer to subpoenas issued against them by both the respondent company and the intervener trade union.

2. This motion was heard before the Honourable Mr. Justice Moorehouse on May 14, 1975, who endorsed the record as follows:

“Mr. Endicott stated the respondent would appear if the evidence is germane to the issue. Evidence before me indicates such evidence will enable the Board to determine whether it is material to the ends of justice. The witnesses seem by the Act to be protected in their evidence and it appears to me the ends of justice can only be met if the Board hear such witnesses. Accordingly if the witnesses will not appear a warrant may issue.

Moorehouse J. (sgd)

3. On May 22, 1975, the hearing before the Board was convened. Mrs. Perly and Mr. Keilty were not present. After lengthy representations, the parties were not able to agree on a method of proceeding pending the result of Mr. Endicott's appeal from the Honourable Mr. Justice Moorehouse's order. Accordingly, the hearing was adjourned until a disposition was reached in the matter before the Court of Appeal. However, when it became apparent to the Board that there would be some time lapse in the Court of Appeal's determination in this matter, the Board in an effort to expedite matters, directed, pursuant to its decision dated June 24, 1975, that this application be relisted for hearing. Accordingly, we called upon the parties, pending the Court of Appeal's decision on the appeal from the order, to adduce whatever other evidence there was available in support of their allegations.

4. The hearing resumed on July 2, 1975, at which time Mr. Sack, counsel for the intervener trade union, called Mr. Gino DeSantis in support of the union's charges against the applicant as previously filed with the Board. Upon completion of his evidence, which was the sole testimony adduced before us, the Board on December 5, 1975, entertained argument from the parties, following which we reserved our decision.

5. In the interim, Mr. Endicott's appeal from the order of the Honourable Mr. Justice Moorehouse was heard by the Ontario Court of Appeal on October 9, 1975, wherein his appeal was dismissed.

6. Upon reserving our decision with respect to the charges as filed against the applicant by Mr. Sack, the Board inquired of Mr. McDermott if he was prepared to adduce evidence in support of the company's charges against the applicant. He indicated in the affirmative and further stated that he proposed to call Mrs. Perly as his first witness. Mrs. Perly at this point indicated that she had certain representations to make to the Board. Upon hearing her representations, the Board directed that she be sworn. Mrs. Perly thereupon stated that she was refusing to be sworn and give testimony in these proceedings. Mr. McDermott was then asked to proceed with any other evidence he wished to call in support of the company's charges. He stated that he proposed to call Mr. Keilty. However when Mr. Keilty entered the hearing room, he also indicated his refusal to be sworn and give evidence in these proceedings.

7. At this juncture, Mr. McDermott requested that the Board upon its own motion state a case to the Divisional Court pursuant to the provisions of Section 13 of *The Statutory Powers Procedure Act*. Upon hearing the representations of all the parties in this regard, the proceedings were adjourned.

8. Having now had the opportunity to carefully assess the representations of the parties in the light of the particular circumstances of this case, the Board is not disposed to accede to Mr. McDermott's request. In our opinion, the enforcement of the order of the Honourable Mr. Justice Moorehouse must and continues to remain the responsibility of the party at whose behest it was initially granted. Moreover, the persons whose testimony is sought to be adduced in these proceedings are not Board witnesses, but rather they were witnesses subpoenaed by the respondent company. Further, the Court of Appeal has in effect ruled upon the propriety of the order issued by the Honourable Mr. Justice Moorehouse. In the face of such rulings, we accordingly must conclude that the appropriate remedy would not be for the Board to now, upon its own motion, commence fresh proceedings with respect to these witnesses.

9. For these reasons, we therefore direct that Mr. McDermott advise the Registrar forthwith as to how he wishes to proceed in this matter.

1157-75-R Oil Chemical & Atomic Workers International Union, (Applicant) v. Wiltshire Catering Division of J.V. Wiltshire Ltd., (Respondent).

BEFORE: K.M. Burkett, Vice-Chairman, and Board Members P.J. O'Keeffe and J.E.C. Robinson, Q.C.

APPEARANCES: *C.S. Sullivan and Beverly Postill for the applicant; Keith Billings and J.V. Wiltshire for the respondent.*

DECISION OF VICE-CHAIRMAN K.M. BURKETT AND BOARD MEMBER J.E.C. ROBINSON, Q.C.: December 8, 1975

2. This is an application for certification.

3. Subsequent to the Parties having met with a Labour Relations Officer and having agreed to an appropriate bargaining unit it was brought out during the Board's examination of the membership evidence that the applicant had failed to file a Form 8, Declaration Concerning Membership Documents. At this point, Mr. C.S. Sullivan, appearing on behalf of the applicant filled out, dated and signed a Form 8 and presented it to the Board. Mr. K. Billings appearing on behalf of the respondent argued that the document had not been filed pursuant to Rule 6 of the Board's Rules of Procedure and that it should not be accepted, and the application should be dismissed.

3. In examining evidence submitted in support of an application for certification, the Board for practical reasons cannot interview each and every employee on whose behalf

membership evidence is submitted. Rather, the Board compares the signatures on the documentary evidence with those supplied by the employer and in addition requires a signed attestation by a union official to the fact that the method of collection and payment of dues or initiation fees conforms with Board policy. It is incumbent upon the Board to carefully scrutinize all membership evidence filed in support of an application for certification. The Board stated in the *Webster Air Equipment* case, 58 CLLC.18,110 at page 1717:

“...since the Board is compelled to rely to such an extent on evidence which by the very nature of things is not subject to examination by the parties to the proceedings it must be very circumspect in accepting it ...”

4. The Board acknowledges that it has the authority under Rule 57(2) to enlarge the time prescribed by section 6 of the Board's Rules of Procedure to permit a late filing of Form 8. However, in this instance the applicant had not merely forgotten to file but had neglected to complete and sign the document and would not have done so if the Board had not discovered the omission and brought it to the applicant's attention, and in addition he had difficulty in answering Mr. Robinson's question with respect to the nature of the inquiries he had undertaken to satisfy the requirements of the Form 8. Having regard to these circumstances and to the heavy onus which falls on the Board to carefully scrutinize evidence in support of an application for certification, the Board is not prepared to exercise its discretion under Rule 57(2) and extend the time limit prescribed in Rule 6 of the Board's Rules of Procedure. This Board is aware that there is precedent to support the filing of the Form 8 at the hearing, however, to do so in this case would seem to undermine the credibility of the Board as regards its careful scrutiny of evidence in support of all certification applications.

5. Accordingly, the application is dismissed.

DECISION OF BOARD MEMBER P.J. O'KEEFFE:

In this application for certification certain problems with respect to the description of the bargaining unit cropped up during the hearing in this matter. Following on the Board's relatively new practice of speeding up its decisions it directed the parties to meet with our Labour Relations Officer, who was in attendance at the hearing, to endeavour to agree between themselves on the description of the bargaining unit. As a result of meeting with the Officer the parties arrived at a mutual agreement with respect to the proposed bargaining unit, for this satisfactory result much credit must be accorded to our Officer and the parties in that mutual agreement in this matter represented accord between the parties on four difficult items in dispute between them.

The parties then returned to the Board room and informed us of the above noted agreement. A review by the Board of the list of employees in the agreed bargaining unit and the membership evidence filed by the Union established that the Union represented more than fifty-five per cent of the employees in the bargaining unit and in normal circumstances would be certified outright. During the hearing the Board noted and informed the Union that a Form 8 had not been filed in this application as required by the Board's rules. The representative for the Union explained to the Board that it was his normal practice to initially file his application for certification and subsequently file Form 8 at the time he filed his membership evidence, but on this occasion, because of the Postal Strike he had filed his

membership evidence with his original application for certification. He had neglected to file Form 8 prior to the hearing and he then dated and signed a Form 8 and presented it to the Board. In accordance with the Board's well established practice of not requiring strict compliance with section 6 of its Rules as to the time for filing a Form 8, I would accept the filing of Form 8 as was done at this hearing as satisfying the Board's requirements in this regard. The acceptance of the practice of allowing an applicant Union to file its Form 8 up to and including the time of hearing has become so routine that this fact is not now even noted in Board decisions. At an earlier time the Board has had to deal with the question of strict compliance with section 6 as it relates to the filing of Form 8. A review of the earlier decisions on this question clearly establishes that the Board was not going to allow itself to be shackled with strict technical applications of its Rules, see the following: *Sovereign Construction Company Limited*, OLRB. Report Sept.1966, p.422, *Collingwood Shipyards, Division of Canadian Shipbuilding and Engineering Limited*, OLRB Rep.p.246. *Friedsman Department Store, Operated by Soo Jobbing Company Limited*, OLRB. Rep.Sept.1969, p.794.

The Webster Air Equipment case, 58 CLLC, 18,110 at page 1717, quoted in the majority decision has in my respectful opinion no bearing to the facts as outlined in the instant case and in any event in 1958 at the time of the above noted case there was no requirement by the Board to file any documentary evidence of the nature of Form 8, at that time the Board required oral assurances by the applicant's representative at the hearing. The Board's current non-technical approach to matters of this kind are well expressed in the *Canadian General-Tower Limited* case, OLRB, report Oct.1968 at p.715 and I quote:

"The fact that the applicant in this matter has requested a pre-hearing representation vote and asked leave to file Form 8 after the time prescribed by section 6 of the Board's Rules but before the Board considered the evidence in this case and before any decision was made, has not, in our view, materially altered the conditions so that the Board should refuse to enlarge the time for filing Form 8 in accordance with the Board's usual practice.

The Board strictly enforces the provisions of Section 48 of the Board's Rules of Procedure which provide for the filing, not later than the terminal date, of membership evidence in a trade union or of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union. However, Form 8, Declaration Concerning Membership Documents, is not, of itself, membership evidence but, although in written form, is evidence which identifies and substantiates the evidence of membership as contemplated by section 48(2) of the Board's Rules of Procedure.

Since Form 8 only identifies and substantiates the documentary evidence of membership which has been previously filed, this type of evidence is acceptable at the hearing of an application pursuant to the provisions of section 48(2).

The Board's Rules of Procedure are not designed as obstacles placed in the path of parties to a Proceeding, but are intended to permit the Board to administer the Labour Relations Act in a manner whereby

one party will not be able to unfairly gain a procedural advantage over the other to the prejudice of the other party. The Board's Primary function in an application for certification is to determine the true wishes of the employees in the bargaining unit in the exercise of their right to choose a bargaining agent. This function is not properly exercised if the Board refuses to make the determination of the employees' wishes because of some technical irregularity which in no way creates an unfair advantage prejudicial to the rights of a party or prevents the Board from properly assessing the evidence."

I would issue a certificate to the applicant for the agreed upon bargaining unit.

ADDENDUM: VICE-CHAIRMAN K. M. BURKETT

This decision was based on the particular circumstances of this case and is not intended to signify an overly technical approach to the time requirements with respect to the filing of the Form 8.

0833-75-U Nick Bachiu, (Complainant) v. United Steelworkers of America, Local 1005, (Respondent) v. The Steel Company of Canada Limited, (Employer).

BEFORE: George W. Adams, Vice-Chairman, and Board Members O. Hodges and F.W. Murray.

APPEARANCES: *Derek V. Lee for the complainant; J.A. Ryder, Cecil Taylor and William Elliott for the respondent; T.F. Storie, V.P. Harris and D. Williams for the employer.*

DECISION OF THE BOARD: December 3, 1975

2. This is a complaint under section 79 of *The Labour Relations Act* alleging a violation of section 60. The complaint was filed against the respondent and by letter dated October 8, 1975 the complainant's lawyer advised the Board that the relief claimed directly involved the employer, Steel Company of Canada. Counsel therefore requested that the employer "be given notice of the hearing ..., and that [it] be advised ... a successful application would result in [it] being bound by an order of the Board". The Board advised the Steel Company of Canada of this fact by a letter dated October 14, 1975. It should be noted that since *Imperial Tobacco Products (Ontario) Ltd.* [1974] OLRB Mthly. Rep. 418 the Board, on its own initiative, has attempted to advise employers that they may be affected by a section 60 proceeding whenever the face of a complaint reveals such an interest. This notice must be considered in conjunction with Rule 54 which reads:

54. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

Where such a notice has been given a complainant should move at the commencement of a hearing that the employer be formally added as a party, although the Board may do this of its own motion. In the instant case, the employer attended the hearing and, though not formally added as a party, participated in the proceedings. Counsel for the complainant may have considered that his letter of October 8, 1975 amounted to a formal request and that his request was uncontested in light of the employer's appearance at the hearing. However, Mr. Williams, a management representative of the Steel Company of Canada, had been subpoenaed by the respondent trade union and we seem to recall that Mr. Storie, his counsel, indicated that this was the principal reason for his [Mr. Storie's] attendance.

It should be noted that section 11(1) of *The Statutory Powers Procedure Act*, 1971 Stat. Ont., c. 47 reads:

11(1) A witness at a hearing is entitled to be advised by his counsel or agent as to his rights but such counsel or agent may take no other part in the hearing without leave of the tribunal.

Mr. Storie did not seek leave under this section and we therefore assumed that his full participation in the proceedings was on behalf of the employer and this is why the employer's name appears in the style of cause. We only recite this sequence of events so there will be no confusion with respect to the addition of the Steel Company of Canada as a party in the absence of a formal motion at the hearing.

3. The complainant, Nick Bachiu, alleges that the respondent violated section 60 "having withdrawn [his] grievance and any right to an appeal, to [his] prejudice and being arbitrary, discriminatory, and no notice being given to [him] and against laws of natural justice". He requests that he be "paid all monies and S.P.P. plan plus report taken from file".

4. The complainant works in the coke oven section of the employer's operations and testified that when he arrived at work on January 3rd, 1975 for the 4:00 p.m. shift none of his fellow employees were going to work. Rather, they had all assembled in the lunchroom and refused to work until they were told about the firing of three fellow employees that had occurred about Christmas time. Supervisors came into the lunchroom and asked for an explanation but no one would say anything apparently. Then one of the supervisors assured the employees that the name of anyone who spoke up would not get back to management and Bachiu said that he relied on this assurance in standing up and saying that "the guys are waiting for the results of a meeting". Bachiu stated that another foreman then told them that if they were not going to work "... go home" and Bachiu, along with at least five other employees began to leave the plant. On leaving the plant they were met by two other foremen who persuaded them to return to work. Bachiu worked until 11:00 p.m. and then left the plant to go home (despite the fact that his shift formally ends at 12:00 a.m.). He went out to the parking lot that empties on to Wilcox Street with Gerald Groves, a fellow employee, and they got into Bachiu's car, a 1974 Monte Carlo. He testified that his car was the only one pulling out on to Wilcox Street at the time and he noticed a picket line at the intersection of Wilcox Street and Burlington Street. He said that on driving closer to the picket line he noticed that a yellow car coming down Wilcox off Burlington Street had been stopped by the crowd and was being kicked. He also noticed police in attendance. Fearing that his car would be damaged, he parked it along Wilcox Street and both he and Groves went

up to the picket line to ascertain if they would get through. According to both Groves and Bachiu, they were in the vicinity of the picket line for some five minutes but then returned to the car and drove home. A number of days later he was called into Mr. Forbes' office – his supervisor – and questioned about the incident. A few days after that Forbes called back again and gave him a five day suspension. Bachiu claims that Forbes told him the suspension was not for the work stoppage but for his presence on the picket line. Groves received no discipline. The discipline report reads:

“This discipline report is issued for your participation in an illegal strike which commenced January 3, 1975 and terminated on January 4, 1975 in violation of Section 10 of the Basic Agreement dated August 18, 1972.”

“For your participation in this illegal strike you are suspended for 5 working days from Jan. 27 to Jan. 31st. You are also warned that any future violations of Section 10 will result in a more severe application of the terms of Clause 10.02 of the Basic Agreement which reads as follows: “Any employee who participates in any interruption, work stoppage, strike, slowdown or any other interference with production may be disciplined or discharged by the Company”.”

5. Bachiu's immediate grievance was rejected by Forbes and therefore he attended at the union hall to have the matter pursued by the respondent under the terms of the collective agreement. On attending at the hall he spoke with Mr. Jim Gillam, a representative of the respondent, and told him his story. Gillam wrote up the following brief:

“I was called into the office on the 16th of Jan/75 for an investigation pertaining to a wildcat strike which occurred on Jan 3/75. On Jan 17th, I was called again and told I was going to get a suspension on Jan 27, 28, 29, 30, 31 inclusive, return to work on Feb 3/75.

At the investigation I gave my story which is as follows on Jan 3/75, I was working 4-12 pm shift. As of when the shift started which was approx. 4:30 because there was a lot of talking going on in lunch room. I just listened. After which I went to work and completed the whole shift.

After I had washed up I got my car out of the Main Lot at Wilcox as I drove out, I noticed a lot of guys so I parked my car beside a police cruiser on Wilcox St. I went over to the guys and asked to let me through without kicking the shit out of my car because that what they were doing as I approached.

I was only there approx 5 mins. just as long as it took to walk over and back to any car. I parked between the two cruisers for safety. There was a rider with me Jerry Graves, Coke Oven was witness.”

Bachiu returned to the union hall “three or four times” after that to inquire about the progress of his grievance and each time was told that it was being “worked on”. Finally, some time in August, he noticed a union report indicating that his grievance had been withdrawn

and this caused him to go to the union hall to find out why. At that time, Mr. Cec Taylor, chairman of the respondent's grievance committee, told him that the company had taken the position that he had been a spokesman in the work stoppage and the trade union had been concerned about his work record. He and Taylor then argued over whether there had been any violence on the picket line with Taylor saying that there had been an arbitration and no violence had been established.

6. The bargaining unit consists of some 11,500 employees and Taylor has been the full-time chairman of the respondent's grievance committee for some five and a half years. He testified that 114 grievances arose out of the coke oven incident consisting of 16 discharge matters. He stated that for at least the last sixteen years the respondent and the employer – apparently at the employer's request – have followed the practice of considering all outstanding grievances during the negotiations for a new contract. And this practice was followed in 1975. Thus, save for the 16 discharge cases which were referred to arbitration, the coke oven grievances were among 398 grievances "referred to negotiations" in the following way. A sub-committee on grievances was struck and the membership was informed on April 9th that the coke oven grievances were among the grievances to be dealt with during the 1975 contract negotiations. Taylor stated that the company agreed to the arbitration of the 16 discharge cases and approached the resolution of the rest of the coke oven grievances by suggesting disciplinary groupings. The committee then reviewed the proposed groupings and took different positions on the merits of both particular groupings. The following memorandum indicates Bachiu's grievance was one that the committee wanted to pursue.

"Coke Ovens Work Stoppage

The Union disputes the guilt of the men working in the following areas: Batteries, Patching Crew, Screen House and Coal Handling, as many of these workers had permission from supervision to leave early. No men from these work areas of the Coke Ovens participated in the picket lines at any time. Consequently, the discipline reports for this incident should be removed from the records of these men and they should be paid all the money owing them from the Supplementary Payment Plan. The Union will accept discipline reports for leaving the job early. The Union would like to draw the Company's attention to one case in particular, D. DiDonato – #2081. This man left work at 11:30 am, January 3rd because he was sick. He subsequently off work for an entire week, returning with his doctor's note.

5-Day Suspensions

Contingent upon the Company paying monies lost under the SPP, the Union will withdraw all the grievances of those men on the day shift picket line without prejudice with the exception of M. Garrett, #1995. Garrett was on his days off, was nowhere near the plant at the time and should therefore receive his SPP, have the discipline report removed from his record, and be paid for his five-day unwarranted suspension.

Also contingent upon the Company paying the SPP monies of those men on the night picket line the Union will withdraw these grievances without Prejudice, *with the exception of N. Bachiu, # 1998 and S. Smith, # 1958. Neither of these men were involved at any time with the picket line and should receive all monies owing them from the SPP and five-day suspensions and have the discipline reports removed from their respective files.* [emphasis added]

2-Day Suspensions

If the Company will pay #1974 – McConnachie, #1975 – Gerstenberger, #1989 – Trombetta and #1990 – Mathieson, the monies owing them from the SPP, the Union will agree to withdraw their grievances without prejudice.

In the case of #1992 – Schnurr and #1994 – Melfi, the Company must pay all monies lost and remove the discipline reports from the work records of these men.

Loss of Statutory Holiday Allowance

The following men are entitled to their holiday allowance and should have their discipline reports removed from their discipline reports removed from their work files: – P. Berolo #2120, R. Kyle #2121; D. Thompson #2122; R. Cassa #2123; A. Nestmann #2124; G. Lant #2125; L. Zitella #2126 and J. Guastadisegni #2145.

Unjustified Absence

No unjustified absence reports should be left on the files of R. VanFleet #2071; G. Choppick #2072; J. Corbett #2073; J. Lamb #2074 and I. Hegedus #2178.

In particular, D. Bell #2087 received permission from management to leave the job early.”

7. Some eleven meetings with the management during the month of July ensued and, as the following excerpt from a memorandum dated July 19, 1975 evidences, the union strenuously objected to the company’s alleged insistence on Package deals – presumably a reference to the “swapping” of grievances without regard to their merits. The excerpt, part of an official complaint to the company, reads:

“The Union would like to lodge two protests:

1. The Company knows the Union is opposed to package deals. Twice during these negotiations the Union’s reasons for this position were discussed with the Company – once with Dave Williams and once with Brian Walker. Now we have again been told that we must accept a package deal.

On Wednesday the Company offered to concede four grievances on the understanding that the Union would withdraw nineteen. This is totally impossible. The Union refuses to deal with workers' legitimate grievances against the Company in this way. Although the Company is well aware of this fact, their negotiators have continued to propose package deals. For the third and last time the Union will record its objection.

Package deals on grievances are not acceptable to the Union because each man has a right to have his grievance assessed on its merits. A worker lodges a grievance with the Union only when he feels he has been treated unfairly by the Company. Occasionally, according to the provisions of the collective agreement, there is no grievance. When this has happened the Union has been willing to withdraw, but this clearly has absolutely no bearing on the settling of valid grievances.

When grievances are packaged together justified grievances are submerged amongst the rest. By doing this the Company hopes to tempt the Union to accept a settlement of a mixture of good and not so good ones in order to get them all off the table. Certainly, it can be a long tedious process dealing with grievances one by one and a lot less work for both sides to bundle them together for settlement. Nevertheless, the Union takes the position that there is no justification for ignoring the merits of good grievances, no matter how tempting the offer, just to get them settled."

However, negotiations continued and eventually all 398 grievances were resolved. The results were appended to the new contract for ratification by the membership and it was reported that the union withdrew 204 grievances, or 51.3%, and the company allowed or satisfactorily modified 193, or 48.7%. Bachiu's grievance was one of those withdrawn.

8. Taylor testified that in making its decisions the committee was assisted by a group of research people who commuted back and forth between Hamilton and Toronto (the latter city being the site of the negotiations) and by the briefs that had been prepared at the date of filing of each grievance. He went on to state the reasons for withdrawing Bachiu's grievance. The trade union's investigations, supplemented by the arbitration hearings in the 16 discharge cases, established, as far as the committee was concerned, that there was no violence on the picket lines. We also note that Mr. Williams, in charge of the employer's industrial relations, was satisfied that no violence had occurred, although he thought the picket line had been disruptive and had prevented a number of employees from entering the plant. Taylor said the investigations established that at least the cars going from Wilcox Street on to Burlington Street were not being stopped. He said that all of these considerations finally caused the committee to conclude that Bachiu had "no business being there". The company also raised the fact that they viewed him as the spokesman during the sit-down and emphasized that he had attempted to walk off the job. Of additional importance was Bachiu's work record which included five previous incidents involving discipline. When all of these matters were reviewed the committee unanimously voted to withdraw Bachiu's grievance.

9. Taylor told the Board that the procedure of referring grievances to negotiations has been a “political issue” within the trade union for some time and that he, personally, had opposed it in the past. However, there has been insufficient opposition to effect a policy change. The Board was advised that the procedure has achieved more successful results than grievance arbitration and this may be one reason why the policy has remained in place.

10. In summarizing the reasons for withdrawing Bachiu’s grievance Taylor emphasized that over 1,200 employees left the same gate as Bachiu on January 3rd and at about the same time. Because the other 1,200 employees were able to exit without stopping, Taylor and the committee disbelieved Bachiu’s story.

11. Counsel to the complainant stressed three considerations in submitting that a violation of section 60 had been made out. First, he submitted that if Bachiu was believed, the Board must conclude that he was disciplined without just cause. Secondly, the procedure adopted by the respondent was said to be intrinsically unfair (and arbitrary) in that Bachiu was denied a careful hearing on the merits of the grievance – a hearing that would have confirmed Bachiu’s innocence. Thirdly, the Board’s attention was drawn to the fact that in the course of the committee’s deliberations the company’s reasons for disciplining him had been expanded without his knowledge. It was further argued that he should have been consulted before the grievance was withdrawn. Counsel concluded that the combination of these considerations supported the conclusion that the complainant had been dealt with in an arbitrary manner.

On behalf of the respondent it was submitted that no violation had been proved in that the evidence unequivocally established that Bachiu received individual treatment regardless of his claim that the grievance had been “packaged” or “swapped”. It was further suggested that the procedure adopted by the respondent amounted to a long-standing practice with which all the respondent’s members were familiar. Moreover, the procedure was described as one designed to free-up the grievance procedure for the commencement of a new contract – a commendable purpose and well within a bargaining agent’s statutory authority.

The employer explained that it had not adduced evidence with respect to the merits of the grievance because it believed the complainant’s request for relief to be premature. It was submitted that if an employer was obligated to adduce all its evidence on the merits of the grievance before a violation of section 60 had been established the Board would be making an unwarranted encroachment on the jurisdiction of an arbitration board. In other words, it was suggested that, as a matter of policy, the Board ought not to arbitrate the grievances that come before it under section 60, or, at the very least, the Board should not consider the merits of a grievance until after a violation of section 60 has been established.

12. An employee has no absolute right to have his grievance taken to arbitration. And a trade union, as an employee’s exclusive bargaining agent, has the legal authority to settle or withdraw a grievance without an employee’s consent. The labour relations policy supporting this legal conclusion was made express in the following excerpt taken from *Vaca v. Sipes* (1967) 386 U.S. 1971:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In LMRA Section 203(d), 29 USC Section 173(d), Congress declared that "Final adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavour in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as a statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievance to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully...It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by LMRA Section 203(d), *supra*, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievance unilaterally to invoke arbitration. Nor do we see substantial danger to the interest of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.

13. The complainant does not suggest that the respondent acted in bad faith or that it discriminated against him but rather he submits that it represented him in an arbitrary manner. What facts are before us that would justify this conclusion? The grievance was withdrawn without his consent but as noted above he has no absolute right to the arbitration of

his grievance. While it was argued that his grievance had merit, this too, in itself, is insufficient to support the complaint. The trade union recorded the complainant's version of the January 3rd incident and conducted its own independent investigation assisted by an arbitration dealing with the discharge of sixteen other employees. After assessing all of this evidence the union's grievance committee decided unanimously that the complainant's grievance ought to be withdrawn.

14. Having reviewed all of the evidence the Board is satisfied that the respondent conducted an adequate investigation of the complainant's grievance and that the results of the investigation provided a rational justification for the final posture adopted by the committee. Even if the employer could be confined to the complainant's picket line activity in justifying the discipline, Bachiu's actions at the beginning of the shift would clearly be admissible with respect to the *bona fides* of his explanation for being on the picket line and might colour a board of arbitration's perception in that regard. Furthermore, the fact that he appears to have been the only employee to stop his car and attend at the picket line, tends to undermine his explanation that he was there only out of concern for his car. This aspect of his story is out of tune with the evidence suggesting that the only cars being interfered with were cars coming off Burlington Street on to Wilcox. Cars going west on Burlington Street could do so with no interruption and, although cars going east on Burlington Street might have had to stop, they were clearly not the subject matter of the picket line. We also have some difficulty reconciling the complainant's claim that a yellow car was being damaged with the undisputed presence of the police and William's evidence that no violence occurred on the picket line. When all these facts are considered a board of arbitration could reasonably reject the complainant's explanation and, in the light of his employment record, dismiss the grievance. This is the issue that the respondent trade union had to put its mind to and for all of the foregoing considerations we are satisfied that its decision to withdraw the grievance was one that could be rationally arrived at after an adequate investigation of the facts.

15. The complainant also submitted that the procedure adopted by the respondent was inherently arbitrary. This was so because the grievance had been inserted into the negotiation process and because the complainant had not been apprised of the additional grounds upon which the company was relying. We cannot accept this submission either.

The bargaining unit in which the complainant works is very large by any standard. Given grievance arbitration as we now know it, it is almost inevitable that in such a bargaining unit more grievances will arise during the life of the collective agreement than can be resolved before the contract expiration date. In fact a general criticism has arisen that grievance arbitration is failing to achieve the speed and economy that it was originally designed for. (See Goldblatt, *Justice Delayed... The Arbitration Process in Ontario*, Labour Council of Metropolitan Toronto (1974). This reality is forcing parties to fashion dispute resolving alternatives to grievance arbitration in order to prevent the administration of an agreement from becoming bogged down in a quagmire of unresolved disputes. Some parties have adopted more expeditious forms of grievance arbitration (List, *Scheme Settles Inco Disputes Quickly*, Globe and Mail, October 16, 1973) and others, like the respondent and employer, have fashioned a procedure that ties grievance negotiations to the negotiation of a new collective agreement in order to provide an underlying urgency for compromise and rational discussion. The Board cannot be oblivious to the very real pressures that have spawned this search for alternatives and we are of the opinion that neither procedure is inherently unfair or arbitrary.

However, we want to state that there was no evidence that the complainant's grievance had been traded off against the unrelated grievances of other employees or had been exchanged for a promise that was of value to the entire bargaining unit. And this being the case, the union's authority to "swap" individual grievances is not before us. (But on this issue see *ILWU Local 43 v. Pacific Maritime Association*, 441 F 2d 1061 (9th Cir. 1971), cert. denied, 404 U.S. 1016 (1972); *Simberlund v. Long Island R.R.* 421 F 2d 1219 (2d Cir. 1970); and Clark, *The Duty of Fair Representation: A Theoretical Structure* (1973), 51 Texas L Rev. 119 at page 1174.)

16. We also find that the respondent did not violate its statutory duty in failing to contact the complainant after his brief had been prepared. The respondent had many other sources of information about the incident and, as Taylor testified, the complainant could not have provided the committee with any additional information that would have caused it to change its decision.

17. Before concluding we wish to respond briefly to the employer's submissions on the appropriate procedural format before the Board in section 60 cases. We do not believe that the merits of the grievance and the merits of a section 60 complaint can be, or should be, separated as a matter of procedure. The Board has to know all the circumstances surrounding a grievance to assess whether the trade union has dealt with it in a proper manner. The employer's version will usually be very helpful in making this determination. However, in those cases where the Board finds that a violation of section 60 has been made out, a judgment on the merits of a complainant's grievance will not follow automatically. The Board may adjudicate a grievance where the outcome of grievance arbitration is beyond doubt (*Joseph Pap* [1974] OLRB Mthly. Rep. Jan. 60) or it may do this where there is a concern that grievance arbitration will not provide an effective remedy (as explained in *Imperial Tobacco*). For example, this latter possibility may arise if the violation of section 60 is based on either the bad faith or discrimination of a trade union. But in other cases, where the outcome of arbitration is problematic and the Board is assured that the trade union will represent the complainant fairly, the more appropriate remedy, in light of the policy underlying section 37 of the legislation, may be to refer the matter to arbitration under the agreement and not for the Board to give its opinion on the merits (although it may retain jurisdiction). Of course this will depend on the peculiar nature of each matter that comes before the Board. (In fact, a successful complainant may not be entitled to a judgement on the merits – see dissent in *Pedalino and United Steelworkers of America*, Board File 0651-75-U.) However, this is not to deny that, with experience, the Board may come to the conclusion that, for reasons of economy and expedition, it should finally dispose of all established violations. In our opinion the Board and the parties should be prepared to experiment with remedies and no clear rule needs to be articulated – at least we see no need for remedial certainty at this time.

18. The complaint is dismissed.

0835-75-R **Bruce MacIntyre**, (Applicant) v. Teamsters, Chauffeurs, Warehousemen, Helpers, Local Union No. 91, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen, Helpers of America, (Respondent).

BEFORE: T. E. Armstrong, Q.C. Chairman, and Board Members J.D. Bell and P. J. O'Keeffe.

APPEARANCES: *R. W. Cosman for the applicant, I. J. Thomson for the respondent.*

DECISION OF THE BOARD: December 4, 1975

1. This is an application for termination of bargaining rights. The respondent opposes the application on the ground that Part V of the *Canada Labour Code*, R.S.C. 1970, c. L-1, rather than the *Ontario Labour Relations Act*, governs the labour relations between the employer and its employees, for the reason that the employer's undertaking falls within the exclusive jurisdiction of the Parliament of Canada under sections 91(29) and 92(10)(a) of the *B.N.A. Act*, and under section 108 of the *Canada Labour Code*.

2. The employer's only terminals are in Cornwall, Ontario and it is engaged primarily in local cartage in the Cornwall area. The applicant is one of five drivers, three of whom, according to the applicant, drive exclusively within the boundaries of the Province of Ontario. According to the applicant, the other two drivers are periodically required to drive from Cornwall across the Seaway International Bridge to the United States Customs compound at Rooseveltown, New York to pick up cargo for transhipment to Ontario customers. This type of pick-up was referred to as "interlining" with another carrier, the freight having been dropped at the United States Customs by a United States carrier. The applicant's evidence was the same two drivers may also travel to Massena, New York described as a border town close to Rooseveltown, to pick up freight for Ontario destinations. According to the witness, these trips to Massena might be as frequent as one per week. Finally, the applicant testified that the employer is properly licensed as a public carrier in Ontario, with authority to carry certain goods to the international border at the St. Lawrence River for furtherance to the United States, and by the Interstate Commerce Commission to travel within the U.S.A., at least as far as Massena, New York.

3. The employer's manager, A. R. Graham, conceded that the employer held licences granting certain privileges for extraprovincial carriage. He contended, however, that the extraprovincial portions of those licences were inoperative and dormant. At one time, he stated, the company carried boats, boat moulds and related goods for Courtaulds Moulded Products Limited to and from points in the U.S.A., crossing the international border both at Cornwall and at the St. Mary's River. This operation ceased in the early 1960's and there is no prospect that it will be revived. Similarly, the employer's carriage of pipe and conduit for Domtar Construction Materials Limited from Cornwall to construction sites in the Montreal area was discontinued in the late 1960's. The extraprovincial authority to carry goods for Courtaulds and Domtar still appears in the employer's licence but, in both cases, the operations have ceased.

4. The employer's licence, according to Graham, also contains permission for the carriage of one person's goods at a time on a continuous trip basis from Ontario to the international boundary at Cornwall "for furtherance to the U.S.A. and return". He testified that this authority was only exercised in the following limited circumstances:

- a) The employer occasionally hauls freight from the U.S. Customs compound at Rooseveltown, New York to Ontario. This is the interlining operation referred to by the applicant. It occurs at the request, or on the call, of U.S. carriers who drop freight destined for Canada at the Rooseveltown compound. When asked whether the employer has a depot in the U.S., Mr. Graham replied, "No, we interline our trailers at U.S. Customs, which is considered part of Rooseveltown. We just go across the border." Although the evidence lacked precision, it appears that interlining does not occur with great frequency, nor does it constitute, in volume or value, a substantial segment of the employer's local cartage business.
- b) Until recently, the employer occasionally picked up freight for two Cornwall customers from railway box-cars in Massena, New York. In both cases these transshipment operations have been discontinued, since the freight is now coming directly into Canada by rail. One of the customers was Courtaulds, and the last haulage of freight for Courtaulds between Massena and Cornwall occurred in 1974. The other customer was Virchem Limited. As late as October 1975, the employer carried a sulphite bleaching substance for Virchem from Massena to Cornwall. According to the witness, this carriage has now terminated because of the direct rail service from the U.S.A. to Cornwall.

5. On the evidence, we find that the employer is a common carrier engaged primarily in the carriage of freight within the Province of Ontario. In determining the jurisdictional question, we must concern ourselves with the company's actual operations, not with the business which it might potentially acquire under its operating licences. On this test, it is clear that its only current external undertaking is the relatively insignificant interlining operation at the U.S. Customs compound at Rooseveltown, New York. It is engaged in no inter-provincial carriage. On these findings, we must determine whether the employer's operations fall within provincial or federal jurisdiction.

- 6. The jurisdiction of a provincial labour relations board over the labour relations of an employer said to be engaged in interprovincial or international carriage has been the subject of a number of court decisions: *A.-G. Ont. et al. v. Winner, Winner et al. v. S.M.T. (Eastern) Ltd.*, [1954] 4 D.L.R. 657, 71 C.R.T.C. 225, [1954] A.C. 541, 13 W.W.R. (N.S.) 657; *Re Tank Truck Transport Ltd.*, 25 D.L.R. (2d) 161 [1960] O.R. 497 *sub nom. R. v. Toronto Magistrates, Ex p. Tank Truck Transport Ltd.*; affirmed on appeal 36 D.L.R. (2d) 636, [1963] 1 O.R. 272; *R. v. Cooksville Magistrate's Court, Ex p. Liquid Cargo Lines Ltd.*, 46 D.L.R. (2d) 700, [1965] 1 O.R. 84; *Regina v. Manitoba Labour Board Ex parte Invictus Ltd.*, 65 D.L.R. (2d) 517; *Brewster Transport Co. Ltd. v. Amalgamated Transit Union, Division 1374*, an unreported decision of the Alberta Superior Court (Riley, J.), August 18, 1966, and *Pacific*

Produce Delivery v. Labour Relations Board of B.C., [1974] 3 W.W.R. 389 (B.C. Court of Appeal). The approach of the courts to the constitutional issue has not been uniform. However, certain fundamental principles appear to be conceded. In order for provincial jurisdiction to be ousted, it must be established that the employer is engaged in a work and undertaking connecting the province with any other or others of the provinces or extending beyond the limits of the province. The words "Works and Undertakings" in section 92(10)(a) are to be read disjunctively, so that the operation or activity in question does not have to be both a work and an undertaking: see *Tank Truck*, *supra*, at p. 166. If the extraprovincial segment of an undertaking is severable, it may be that the labour relations portion of the intraprovincial segment is within Provincial jurisdiction. However, where the undertaking is integrated, as we find it to be in this case, there can be no justification for divided jurisdiction: see *Winner v. S.M.T. (Eastern) Ltd.*, *supra*, per Lord Porter, p. 679, D.L.R.

7. It was contended by the respondent union that so long as there is any extension beyond the provincial boundaries or over the international boundary, irrespective of the frequency of occurrence or depth of external penetration, it necessarily follows that the work or undertaking falls within federal jurisdiction. In our view, the cases do not stand for that unqualified proposition. It may be useful to examine each of the six court cases cited above in an attempt to identify the rationale and reconcile the reasoning.

8. In *Tank Truck*, the Court accepted the employer's contention that the question was not the relative amount of interprovincial, as opposed to extraprovincial, activity but, rather, whether, in fact, there was a "connecting" or "extending" activity. For an activity to connect or extend, McLennan, J. was of the view that its extra-provincial component must be continuous and regular. In so holding, he specifically rejected the union's assertion that the controlling consideration must be the main or primary function of the undertaking measured by volume. In *Tank Truck*, there was no doubt on the evidence that the extraprovincial carriage, although not regularly scheduled, was both regular and continuous. In addition, it may be noted that it was, in absolute terms, substantial: 630 trips beyond the Province in one year. It should also be noted that the Court foresaw situations where carriage or extension beyond the province would not constitute a connecting or extending undertaking. At page 172, D.L.R., McLennan, J. states:

"I agree with counsel for the respondent that not every undertaking capable of connecting Provinces or capable of extending beyond the limits of a Province does so in fact. The words "connecting" and "extending" in s. 92(1)(a) must be given some significance. For example a trucking company or a taxicab company taking goods or passengers *occasionally and at irregular intervals from one Province to another could hardly be said to be an undertaking falling within s. 92(10)(a).*" (*Emphasis added*)

9. In *Liquid Cargo*, Haines, J. adopted the regular and continuous test propounded in *Tank Truck*. Although only 1.6 per cent of Liquid Cargo's loads were hauled to or from points outside Ontario, the absolute number of such trips was, again, substantial: 636 loads in a period of 18 months. Although expressly approving the *Tank Truck* test, he goes on to

suggest an even broader formula for determining the question of connection or extension. At page 88, he states:

"In my view, the fact that many of the applicant's extra-provincial trips are not made at fixed times in accordance with a predetermined schedule does not compel the conclusion that its activity in that regard is not continuous and regular. Viewed from the point of view of the applicant company, it is clear that its customers are provided with extra-provincial service consistently and without interruption whenever they apply to the applicant for such service. *The applicant stands ready at any time to engage in hauls outside the boundaries of the Province of Ontario at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions.* Further, the evidence is clear that it has made such trips frequently during the period for which figures have been provided." (Emphasis added)

The suggestion that there is significance to what the company is empowered and prepared to do is, however, at odds with both *Tank Truck* and *Eastern Canada Stevedoring Co. Ltd.*, [1955] 3 D.L.R. 721, where it was decided that it is what the company actually does that determines the character of its undertaking. In any event, the underlined portion of the passage from *Liquid Cargo* quoted above must be read subject to the concluding observation that Liquid Cargo's extra-provincial trips, although not regularly scheduled, were made "frequently" during the relevant period.

10. The rationale for the decision of the Manitoba Queen's Bench in *Ex parte Invictus Ltd.*, *supra*, is somewhat elusive. The company was in the business of transporting general freight and horses. Its intraprovincial business was on a regularly scheduled basis while its extraprovincial business – limited to the transport of horses – was casual and intermittent undertaken only in response to customer requests. Even so, a substantial dollar value of extraprovincial trade was undertaken, contributing for a single year 5.5. per cent of the company's gross revenue from all sources. The Court adopted the *Tank Truck* test, apparently accepting the proposition that to have a connecting or extending undertaking the extraprovincial portion must be regular and continuous. On the facts, however, the Court concluded that the applicant's extraprovincial business was neither regular nor continuous. Moreover, the Court proceeded to propound a further test which appears to be similar, if not identical, to the one advanced by the union, and rejected by the Court, in *Tank Truck*. At page 529 of the *Invictus* decision, Matas, J. states:

"With respect, I agree with the comment made by McLennan, J., in the *Tank Truck* case, *supra*, that the words "connecting or extending" in s. 92(10)(a) (B.N.A. Act) must be given some significance.

To consider the applicant's extraprovincial business as "regular and continuous" would be stretching the meaning of those words unreasonably.

In constitutional cases, no less than in other cases coming before the Court, it is necessary that the realities of the situation be assessed. The

operations of the applicant, when examined from a practical aspect, are in pith and substance provincial in character. The applicant's extraprovincial transport of horses is incidental to what is essentially and basically an intraprovincial business."

11. In *Brewster Transport Co. Ltd.*, an unreported decision of the Alberta Superior Court referred to in *Invictus*, a different test was adopted. Riley, J. found the need for what he called a permanent interprovincial connecting link in order for the undertaking to be a federal one. In his view, casual, seasonal incursions by a bus and limousine touring company into an adjacent Province – incursions which were found by the Court to be incidental to "the main, the essential and the primary purpose" of the operation – did not constitute the type of connection or extension envisaged by section 92(10)(a).

12. In *Pacific Produce Delivery*, *supra*, the facts were overwhelmingly in favour of the conclusion that the employer's freight haulage business was within federal jurisdiction. Eighty-five per cent of the merchandise handled by the company was hauled by it from the U.S. into B.C. Approximately 60 per cent of the company's time, computed on a mileage basis, was expended on international carriage. Although the extraprovincial operations were not on a scheduled basis, at least one trip per week was made from Vancouver to Seattle and return to pick up perishable produce. In the first eleven months of 1972, there were 350 trips into the U.S. On these facts, Bull, J.A. concluded, at page 394:

"A careful consideration of all the evidence taken as a whole has convinced me beyond doubt that the appellant...carried on as a necessary integral and substantial part of its business and undertaking of hauling, warehousing and delivering merchandise for that company, and often for other importers and exporters, a regular transporting and hauling business outside the province and in the United States."

He concluded, following *Tank Truck*, that since the extraprovincial undertaking was both continuous and regular, it fell within federal jurisdiction.

Carrothers, J.A. reached the same conclusions on different grounds. He states, at page 405:

"In my view, the company's undertaking 'beyond the limits of' British Columbia in the northwestern states of the United States of America, though not formally scheduled, were of such frequency and continuity and involved such a relative preponderance of the produce handled by the company so as to establish for its main primary activity the fundamental character or attribute of an extra-provincial undertaking *Re Tank Truck Transport Ltd.*, [1960] O.R. 497, 25 D.L.R...."

13. Can any firm conclusions be drawn from the authorities? All Courts agree that the central question is the meaning to be attributed to the words *connecting* or *extending*. The Ontario Courts have held that relative volume (as between interprovincial and extraprovincial activity) is an inappropriate test. *Tank Truck* states that the extraprovincial business must be regular and continuous. *Liquid Cargo* agrees, emphasizing the frequency of the extraprovincial trips in the particular case and suggesting, *obiter*, that the mere capacity and

readiness to engage in extraprovincial carriage may be sufficient to bring the operation within federal jurisdiction. *Invictus*, while paying lip-service to the regular and continuous test, concludes that the test cannot be met if the extraprovincial business is incidental to the essential and basic interprovincial character of the undertaking. *Brewster* takes a similar view placing little significance on the extraprovincial business which is casual, seasonal and incidental to the main, essential and primary interprovincial undertaking. Both *Invictus* and *Brewster* uphold provincial jurisdiction despite the frequency of the extraprovincial trips. Finally, the main decision in *Pacific Produce* follows *Tank Truck*, with the concurring judgment adopting a test similar to *Brewster*.

14. It is apparent that *Invictus*, *Brewster* and at least one judge in *Pacific Produce* place some significance on the main, principal or essential – as opposed to the incidental – extraprovincial in character. *Tank Truck*, on the other hand expressly repudiates that distinction, relying, in part, on an inference drawn from Lord Porter's judgment in *Winner*. At page 170 of *Tank Truck*, McLennan, J. states:

"In my opinion the *Winner* case does not support the contention of counsel for the respondent that the interconnecting operation must be the main function of the undertaking to come within s. 92(10)(a). The inference seems to be the other way and to paraphrase Lord Porter's words at P. 679 D.L.R., p. 581 A.C., p. 248 C.R.T.C., the only question apart from a camouflaged local undertaking and as a part of that undertaking does the appellant carry goods beyond the Province so as to connect Ontario and Quebec or extend beyond the limits of Ontario into the United States."

However, the narrow question dealt with by Lord Porter in *Winner* was whether an undertaking admittedly extending beyond provincial limits could be severed, with the province retaining jurisdiction over the intraprovincial segment alone. On the facts, the Privy Council concluded that *Winner's* undertaking – a passenger bus line – was one and indivisible. The decision says nothing about the significance, for constitutional purposes, of determining the main or principal nature of a composite undertaking, an incidental, but still indivisible, segment of which extends beyond the limits of a province.

15. Some support for the suggestion that it may be relevant to determine the main or principal activity of the total undertaking and that the determination may depend, in part at least, on a quantitative measurement of the intraprovincial, as opposed to extraprovincial, activity is contained in *Attorney General for Manitoba v. Manitoba Egg and Poultry Association, et al.*, (1971) 19 D.L.R. (3d) 1969. Essentially, the issue before the Court concerned the right of a provincial marketing agency to regulate and control the marketing, within the province, of agricultural products produced outside the province. Mr. Justice Laskin [as he then was] observed at page 181:

"A knowledge of the market in Manitoba, the extent to which it is supplied by Manitoba producers, and of the competition among them as it is reflected in supply, quality and price, would be of assistance in determining the application of the proposed legislative scheme. Thus, if out-of-Province eggs were, to put an example, *insignificant* in the Manitoba market, this would be a factor bearing on a construction of the

scheme as operative only in respect of Manitoba producers, retailers and consumers in production, distribution and consumption in Manitoba. Conversely, if such eggs were *insignificant* in the Manitoba market, the legislative scheme not being expressly confined to production, distribution and consumption in Manitoba, could properly be regarded as directed to the out-of-Province eggs. In this respect, the issue would be one of its validity or invalidity, and not one of construing it to be applicable only to the distribution and consumption within the Province of eggs produced in the Province.” (Emphasis added)

16. There is no doubt that the main or principal business of L. R. MacDonald is local cartage in the Cornwall area and that the trips to the U.S. Customs compound in Roosevelttown are casual, unscheduled, intermittent and irregular – and, to use Mr. Justice Laskin’s term, “insignificant” in relation to the rest of the undertaking. If the *Invictus* and *Brewster* tests are correct, the essential and basic business of L.R. MacDonald is intraprovincial, and the occasional incidental trips beyond the international boundary at Cornwall do not convert the undertaking into one extending beyond the limits of the province; or, to use the language of the Western Courts, do not alter the main character of the business.

17. If the *Tank Truck* proscription against distinguishing between the main and incidental aspects of a freight transport business is correct, and if the only permissible test is whether the extraprovincial penetrations are regular and continuous, we conclude that this employer’s extraprovincial activity is neither regular nor continuous. In this connection, we adopt the view expressed by McLennan, J. in *Tank Truck*, where he stated that a trucking company taking goods occasionally and at irregular intervals beyond the province can hardly be said to be an undertaking falling within section 92(10)(a).

18. In the further alternative, we are not persuaded that trips across the international border to a U.S. Customs compound, merely for the purpose of picking up goods for delivery within Ontario, make the operation an extending undertaking within section 92(10)(a). So far as we can determine, neither this Board, the Courts, nor any other tribunal has been required to characterize the legal effect of freight exchange, by an “interlining” process, at the international border. Some interlining occurred in *Hendrie and Company Ltd.*, OLRB M.R., March 1964, 646, but the Board’s decision did not turn on the characterization of the interlining, nor was it clear on which side of the border the transshipment occurred. We recognize the conceptual difficulties in making distinctions on the basis of the extent of geographical penetration into a contiguous jurisdiction. Is 500 yards any less an extension than, say, 500 miles? And yet, in *Tank Truck*, the extent of penetration was one of the factors to which McLennan, J. alluded: see p. 165, 25 D.L.R.: “The applicant’s operations so far as Quebec was concerned were not merely to points just over the border between the Provinces but for the most part extended well into Quebec.”

The significance may be even greater where one is dealing with a border exchange. In the instant case, we have found that the only trips beyond Ontario are to the U.S. Customs compound in the border area at Roosevelttown, New York. We have no precise evidence before us as to the location of that compound. However, regardless of its precise location, it is clear that while there is, in a literal sense, a border crossing, there is no extension of the employer’s undertaking as a common carrier beyond Ontario in the normal, commercial sense, as would be the case for example, if the employer had actual contact with

U.S. customers, suppliers or consignees, traversed U.S. highways, used U.S. facilities for fuel, maintenance and servicing, food, accommodation, etc. There is no evidence before us to suggest an extending operation of that sort. On the contrary, there is, in effect, a border pick-up with substantially all of the actual carriage occurring within Ontario. The fact of the border crossing arises not because of any deliberate decision to operate within another jurisdiction, but solely because of international Customs requirements. In short, the operation is simply a border interchange with a foreign carrier and, apart altogether from the infrequency of occurrence, is not, in our view, an extending undertaking of the sort contemplated by section 92(10)(a) of the *B.N.A. Act*.

19. For each of the alternative grounds outlined above, we find that we have jurisdiction to deal with the application. On the evidence, the Board is satisfied that not less than forty-five per cent of the employees of L. R. MacDonald & Sons Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on September 8, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the Purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 49(3) of the said *Act*.

20. The Board directs that a representation vote be taken of the employees of L. R. MacDonald & Sons Limited. Those eligible to vote are all employees save and except foremen, those above the rank of foreman, office staff, sales staff, security guards and office janitors employed by L. R. MacDonald & Sons Limited at its terminals in the City of Cornwall, County of Stormont on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

21. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with L. R. MacDonald & Sons Limited.

22. The matter is referred to the Registrar.

0333-75-R The International Association of Bridge, Structural and Ornamental Ironworkers, Local 736, (Applicant) v. **X D G Limited**, (Respondent) v. Labourers' International Union of North America, Local 1081, (Intervener).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Maurice Green and Frank Murphy appearing for the applicant; R. A. Werry and J. Gunn appearing for the respondent; Laverne Schertzberg appearing for the intervener.*

DECISION OF THE BOARD: December 3, 1975.

1. In a decision dated September 15, 1975, the Board directed the taking of a representation vote. Voters were asked to indicate whether or not they wished to be represented

by the applicant in their employment relations with the respondent. The representation vote was conducted on October 2, 1975.

2. The respondent filed a timely statement of objections and desire to make representations. The respondent alleged that the applicant ignored the Registrar's direction and violated the 72-hour silent period by electioneering subsequent to midnight September 28, 1975. More specifically the respondent alleged that the applicant called a meeting of the employees at the home of G. Kurt (one of the employees in the bargaining unit) on Tuesday, September 30, 1975, for the purpose of discussing the vote. The respondent further alleged that Mr. Frank Murphy, a representative of the applicant, was present at the meeting and spoke to the employees about the forthcoming vote and stated that the applicant was "going to get in at XDG". The respondent also alleged that the applicant supplied steaks, beer and liquor to the employees in an effort to induce them to vote in favour of the applicant. The respondent requested the Board to order a new representation vote.

3. The evidence established that a meeting was held at the home of Gerald Kurt on September 30, 1975. Present at the meeting were five of the eight employees who were employed by the respondent in the bargaining unit of ironworkers, namely, Gerald Kurt, Douglas Sebben, Joe Pagett, Bill Morris and Ted Eberl. The meeting was scheduled to begin at 7:00 p.m. Due to a misunderstanding, Mr. Sebben arrived at Mr. Kurt's home at 5:00 p.m. and had dinner with Mr. and Mrs. Kurt. At about 7:00 p.m. the other employees arrived at Mr. Kurt's home. Mr. Frank Murphy, the assistant business agent of the applicant arrived shortly after 7:00 p.m. and stayed for about an hour. When Mr. Murphy left the meeting, the five employees continued their meeting for about another hour.

4. Mr. Sebben testified that Mr. Eberl told him about the meeting and advised him that Mr. Murphy would be there. Mr. Murphy gave evidence that prior to the meeting on September 30, 1975, he received a telephone call from Mr. Kurt. During this conversation Mr. Kurt asked Mr. Murphy to come to Kitchener and talk to some of the men who worked for the respondent. Mr. Murphy told Mr. Kurt that there was a restricted period and that he had to be careful what he did. Mr. Kurt replied that he was not able to answer some of the men's questions and inquired how he could get the information he required. Subsequently, Mr. Murphy advised Mr. Kurt that he would try to see him on his way home from Douglas Point if time permitted and Mr. Kurt stated that there might be a couple of men present when Mr. Murphy arrived.

5. Mr. Murphy arrived at the meeting and was introduced to the employees of the respondent who were present. Mr. Murphy drank coffee and the others drank beer. Mr. Murphy answered the questions of the employees. The topics included the length of the apprenticeship programme, the starting wage for an apprentice and subsequent wages, places to work, the amount of work which was available for ironworkers, the procedure for joining the applicant, the current wages for ironworkers and the associated fringe benefits including a dental plan. There was also some discussion about the intervener and reference to ironworkers who had worked in Bermuda.

6. Mr. Murphy testified that he was aware of the "silent period" prior to representation votes but that he did not open the Registrar's letter regarding the representation vote on October 2, 1975, until after he had met the employees of the respondent on September 30, 1975. He has been an assistant business agent for the applicant for three years and has previously been involved in two representation votes which were conducted by the Board.

7. We have a great deal of sympathy for Mr. Murphy. Against his better judgment he was prevailed upon by Mr. Kurt, a supporter of the applicant, to discuss the applicant with some of the respondent's employees. It also appears that Mr. Kurt did not clearly indicate to Mr. Murphy that he was actually arranging a meeting with the employees. In the circumstances Mr. Murphy was placed in a position of finding it difficult to say "no". There is no evidence that liquor and steak were served at the meeting. Only Mr. and Mrs. Kurt and Mr. Sebben ate the more modest fare of sausage for dinner and the applicant did not provide the beer.

8. Nevertheless, we conclude that the employees, in common with Mr. Sebben, went to the meeting to hear what the applicant had to offer. It appears that while Mr. Murphy was most cautious in what he said at the meeting, he did in the process of answering questions catalogue what the applicant had to offer the employees. While he did not actually ask them to vote for the applicant, we find that the employees who were present would reasonably draw the inference that they too could enjoy what the applicant had to offer by voting in its favour. In addition, there was some discussion about the alleged shortcomings of the intervener. While the intervener is not a party to the representation vote, it has throughout this applicant shown a keen interest in representing the employees who are affected by this application.

9. The rule which the Board applies with respect to infringements of a "silent period" and consequent requests for the directing of a new representation vote is that there is a heavy onus on the person whose conduct is impugned to satisfy the Board that all reasonable precautions against the infringement have been taken or that the infringement was one that would not reasonably have been foreseen. See the *Automatic Electric (Canada) Ltd. case*, 62 CLLC ¶16,226; the *Wilcolator (Canada) Ltd. case*, OLRB REP, October 1959, p. 245; and the *Kralinator Filters Limited case*, OLRB REP, August 1966, p. 312.

10. Mr. Murphy's conduct was a direct infringement of the "silent period" in that he did engage in propaganda and electioneering during this period. He addressed a meeting of five of the eight eligible voters. The applicant won the representation vote by a margin of five to three. It is not a defence to such an infringement to plead either lack of awareness of the Registrar's directions concerning the representation vote or lack of familiarity with the Board's Rules of Procedure. Mr. Murphy, in fact, knew of the date of the representation vote and was clearly under the general impression that what he was drawn into doing was open to question as an infringement of the "silent period".

11. In the result, a new representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

12. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

13. The matter is referred to the Registrar.

1035-75-R Local Union 1867 of the International Brotherhood of Electrical Workers, (Applicant) v. **Raycot Construction Limited, Noront Construction,** (Respondent).

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Lou Popovich appearing for the applicant; K. R. Valin and Real Racicot appearing for the respondent.*

DECISION OF THE BOARD: November 24, 1975.

1. The name "Raycot Construction" appearing in the style of cause of this application as the name of the respondent is amended to read "Raycot Construction Limited".

2. This is an application which was filed on September 30, 1975, under section 55 of The Labour Relations Act. In its application the applicant alleged that a sale had not taken place and also alleged in its application that a sale had taken place by Noront Construction (hereinafter referred as "Noront") to Raycot Construction (hereinafter referred to as "Raycot"). The applicant also requested the application of section 1 (4) of The Labour Relations Act. After entertaining the representations of the parties at the hearing, the Board announced that it would treat this applications as alleging the sale of a business from Noront to Raycot and as also requesting relief under section 1(4) of The Labour Relations Act with respect to Noront and Raycot.

3. The respondent Noront did not file a reply and did not appear at the hearing. The respondent Raycot attended at the hearing and filed a reply in which it denied that a sale of a business had taken place between Noront and Raycot. Counsel for Raycot informed the Board that Noront went out of business and was dissolved on Septmeber 30, 1975.

4. The applicant called as witnesses Daniel St. Pierre an electrician's apprentice and Rheal Racicot an officer of Raycot.

5. Mr. St. Pierre gave evidence that he commenced working for Noront in February 1974 and that as an employee of Noront he worked on several sites including the concentrator at the Kidd Creek Mine. He informed the Board that he worked with Mr. Racicot as employees of Noront and that Mr. Racicot was at that time a foreman for Noront. The witness gave evidence that at the time he was working for Noront most of the tools were marked with the name Noront and the trucks which were used on the job were marked either "Noront Maintenance" or "Levert".

6. Mr. Racicot testified that he worked for Noront between April and August 19, 1975, and that between August 1 and August 18, 1975, he was employed in a supervisory capacity by Noront. The witness gave evidence that Raycot was incorporated in February 1975 and that on August 18, 1975, Raycot had two employees, Jean-Guy Gravelle and Jean Dunn. Mr. Racicot informed the Board that he believed he also hired two other employees - Don Yanisuk on August 19, 1975, and Jerry Bergeron on August 24, 1975. The witness agreed that prior to August 18, 1975, Messrs. Gravelle, Dunn and Yanisuk had worked for Noront. He gave evidence that he is working for Raycot which has a contract from Levert

Industry Northern Operation to complete a job at the parking lot at the Kidd Creek Mine. Mr. Racicot testified that all of Noront's employees were laid off at 11:00 a.m. on August 15, 1975, when Levert Industry Northern Operation took away the contract for the parking lot at the Kidd Creek Mine and gave it to Raycot. At this point the contract was about forty per cent completed. The witness informed the Board that he worked for Levert Electric in 1968, 1969, 1970 and 1971.

7. Mr. Racicot testified that he has been working as a contractor for about three years and that he obtains work from many sources. The witness testified that Raycot accepted the contract from Levert Industry Northern Operation on a "cost plus basis". He explained that this meant only that there was something for labour and nothing for materials. The witness stated that all the material for the job was on the job site. Mr. Racicot stated that his wife does the payroll and makes up the cheques for Raycot's employees and that Raycot's office address is at 3231 Falconbridge Highway in Garson.

8. In cross-examination, Mr. Racicot stated that he and his wife are the sole officers of Raycot. He also stated that he was not too familiar with a man called Don Wilson and did not know his position, if any, with Noront. He testified that Raycot has not purchased any material, equipment or business from Noront and that Raycot had no connection with Noront and is entirely separate from Noront. The witness explained that Raycot's equipment for the parking lot job at Kidd Creek was either its own or was rented from either Gord Construction or Northland Construction and that none of Raycot's equipment was rented or acquired from Noront.

9. Mr. Racicot related the jobs which Raycot Construction had performed. These jobs included a contract for Brouse Construction in North Bay, a contract for Golden Eagle Composite Limited and a contract for Petroleum Service Limited in Toronto. These jobs lasted for a total of three months. In March 1975, subsequent to its incorporation, Raycot obtained a sub-contract from Noront. This sub-contract lasted five weeks and involved eight employees. The witness testified that at the conclusion of this sub-contract a man from Noront named Don Wilson asked him if he had more work for Raycot's employees and that upon the witness stating that he did not have any further work Mr. Wilson asked if Noront could use the witness and Raycot's men. This offer was accepted and the witness and Raycot's men went to work for Noront until they were laid off on August 15, 1975.

10. In re-examination Mr. Racicot stated that he had personally worked for Noront and Levert Electric in the Past. He stated that the cable for the work at the parking lot at Kidd Creek was delivered to the site on a truck by Star Transport during the early part of September 1975 and that two of Noront's employees were working on the truck.

11. The Board permitted the applicant to proceed first in presenting evidence with respect to this application because the applicant stated in its application that "we are prepared to produce all evidence and witnesses to prove these facts." The Board permitted the applicant to have the carriage of this application for relief under section 55 and 1(4) of The Labour Relations Act. At the conclusion of the evidence the applicant did not raise any question regarding the accuracy of the sufficiency of the evidence which was adduced before the Board.

12. In making its representations, the applicant argued that because Raycot had taken over the Parking lot job at Kidd Creek on August 18, 1975, and had employed former employees of Noront this was sufficient to invoke the provisions of section 1(4). The applicant argued that the company known as Levert apparently had the power to award a contract to Raycot was also the company behind Noront. The applicant requested the Board to appoint a labour relations officer to examine the books and records of Levert Industries Northern Limited, Noront Construction and Maintenance, Raycot Construction Limited, and Raycot Construction. Mr. Popovich stated that he assumed such an examination would Prove that the shareholders and officers are the same for each Company.

13. Raycot argued that there was no evidence of a sale of a business within the meaning of section 55 and objected to the request for relief pursuant to section 1(4) in the same application. Raycot argued that it had operated for four years and had performed work for a variety of contractors. It was also pointed out that there was no common control or ownership between Noront and Raycot and no evidence of an intermingling of their employees. In addition, Raycot contended that the applicant had not supplied the Board with its correct address and that because of this the employees had received notice of this application on October 10, 1975, the terminal date of this application. It was argued by Raycot that this application is a fishing expedition and a back-door attempt to secure certification with respect to Raycot.

14. The Board does not agree that this application constitutes a fishing expedition by the applicant. It appears that there has been a change in the commercial obligations of certain employers and the practical result of this change is to render nugatory the bargaining rights of the applicant which were recently obtained with respect o Noront Construction and Maintenance (see Board File No. 0557-75-R). The applicant found itself faced with a different employer with respect to the same job at Kidd Creek. It is quite clear from the evidence that the applicant is not fully aware of the changes which have occurred with respect to this job. However, the applicant is responsible for framing its application and for endeavouring to include the appropriate parties in its application.

15. With respect for the request for relief under section 55, the Board finds no evidence of a sale of a business from Noront to Raycot. The unchallenged testimony of Mr. Racicot, one of the two officers of Raycot, is that Raycot has not purchased any material, equipment or business from Noront and Raycot has no connection with Noront and is entirely separate from Noront. In addition, there is no evidence that Raycot has ever acquired or rented anything from Noront. Mr. Racicot testified that Raycot's equipment for the parking lot job at Kidd Creek was either its own or was rented from either Gord Construction or Northland Construction. On the basis of the evidence before it, the Board finds no basis for finding that a sale of a business has occurred between Noront and Raycot within the meaning of section 55 of The Labour Relations Act.

16. With respect to the request for relief under section 1(4) of The Labour Relations Act, the Board finds n basis for concluding that associated or related activities or businesses are carried on under common control or direction by Noront and Raycot. The evidence before the Board did not establish any of the criteria established by the Board for the application of section 1(4) in the *Walters Lithographing Company Limited* case. [1971] OLRB M.R. 406, namely: (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control or labour relations.

17. Although the applicant requested relief under section 1(4) as part of its application under section 55 of The Labour Relations Act, the applicant did not allege, either in the material it filed with the Board or at the hearing, that Noront and Raycot are or were under common control or direction as contemplated by section 1(5).

18. In the result, this application is dismissed.

ADDITIONAL REASON OF BOARD MEMBER O. HODGES:

I join in the decision of my fellow Board members in this matter.

However, I feel that I must express concern over a troubling aspect of this case. While the evidence before the Board does not support the conclusions of either a sale of the business or of the existence of related businesses, I am left with the impression that not all the available evidence was brought to light. The evidence that was presented left traces indicating the possible existence of further evidence that might well have revealed the existence of the questioned relationships. It is unfortunate, but not surprising, that this further evidence, (if truly in existence), was not fully brought out.

The law governing labour relations has become increasingly complex over the years as a result of efforts to take into account more and more relevant considerations and to thereby achieve the most fair decisions. The applicant in this case was in the unfortunate position of having to decide not to rely on counsel to prepare and present its case for financial reasons; the local union could not afford the costs the Board was told. Consequently, it may be that the importance of certain evidence was not fully realized and brought to the Board's attention. The Board, of course, must act on more than a mere impression that certain evidence exists and that is why the Board reached the conclusion it did in the circumstances of this case.

Due to the complexity of labour law today, both the union's international or national body, and the members of a local union should come to an awareness of the need for expert legal counsel in certain cases, and should be prepared to meet the costs of such counsel.

A further question should also be considered. How involved should the Board itself become in a case where it is manifest that a party before it is not sufficiently represented?

In the labour field reliance has been placed by the legislature in an administrative tribunal, the Labour Relations Board, to settle conflicts between various parties. Reliance was placed in a tribunal in order to increase the likelihood that the law in this field would take into account the realities of labour relations. One of these realities is often an imbalance in the monetary resources and legal sophistication of the parties involved. In light of this reality, the Board should perhaps consider whether it has a role to play in minimizing these differences.

1199-75-R Toronto Newspaper Guild, Local 87, The Newspaper Guild, (Applicant) v. **The Globe & Mail Limited**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *J. Sack and J. T. Bryant for the applicant; R. V. Hicks, Q.C. and O. R. McGuire for the respondent; T. Vokes for the objectors.*

DECISION OF THE BOARD: November 27, 1975.

2. This is an application for certification dated October 31, 1975 for a group of the respondent's employees of Metropolitan Toronto. In reply to the application the respondent submitted, *inter alia*, that the application should be dismissed on the ground "that the persons comprising the bargaining unit as proposed by the applicant are not employees within the meaning of The Labour Relations Act." It appears that the persons affected by the application and for whom the applicant is seeking representative rights fall under the general classification of "district sales representatives". It also appears that in a previous application for certification involving the same parties the Board determined that "city and district representatives were excluded from the appropriate all employee bargaining unit because of the exercise of managerial functions under section 1(3)(b) of the Act. (See: *The Globe and Mail Limited* case 63 CLLC ¶16,290 at P1201). Since the date of that decision on July 5, 1963 the parties herein have entered into several collective agreements for employees engaged in the respondent's circulation department (hereinafter referred to as "the circulation department agreement"), the last of which is dated February 4, 1974. The recognition clause of this agreement reads as follows:

"PREAMBLE

This Agreement is made on this February 4, 1974, between THE GLOBE AND MAIL LIMITED, a corporation hereinafter known as the Employer, and the TORONTO NEWSPAPER GUILD, local No. 87, chartered by the Newspaper Guild, hereinafter known as the Guild, for itself and on behalf of all the employees of the Employer in the Circulation Department described in Article 1.

ARTICLE 1 – COVERAGE

(101) This Agreement covers all employees of the Employer in the Circulation Department save and except the following: Circulation Manager, City Circulation Manager, Country Circulation Manager, Assistant City Circulation Manager, Assistant Country Circulation Manager, Officer Manager of the Circulation Department, Supervisor Sales Plans, Senior Country Supervisor, Supervisor Traffic, City Supervisors, Country Supervisor, Branch Managers, Supervisor Special Sales, City District Sales Representatives, Country District Sales Representatives, District Sales Representatives, Assistant District Sales Representatives, persons exercising managerial functions equal or superior to those described above, confidential secretaries to the Circulation Man-

ager, the City Circulation Manager, the Country Circulation Manager and Office Manager of the Circulation Department, persons regularly employed for not more than 24 hours per week.”

2. The applicant also has filed a reference under section 95(2) of the Act dated September 22, 1975 requesting that the Board determine the employment status for purposes of the Act of certain persons who occupy job classifications apparently excluded from the bargaining unit described in the collective agreement referred to in paragraph 1 herein. (See Board File No. 0909-75-M). By letter dated October 22, 1975 the applicant informed the Board of the job classifications filled by the particular persons for whom a determination with respect to their status was requested. Save for the general category of “supervisor”, the reference pertains to persons occupying the classifications of “district service representatives” and “city field supervisors”. We were also informed that a grievance has been filed by the applicant under the terms of the subsisting collective agreement “seeking a declaration that the employees are covered by the terms of the agreement”. The reference under section 95(2) of the Act was filed with a view “of seeking the Board’s assistance with respect to the arbitration process”.

3. Counsel for the respondent submitted that the applicant ought to be put to the election of choosing to proceed with either the application for certification or the reference. It was submitted that different considerations flow from a determination with respect to the disputed status of employees for purposes of the Act pursuant to each of the proceedings. It is quite clear, nevertheless, that the pivotal question in both applications pertain to the employment status of “the district sales representative” as of the date of the filing of each of the respective applications.

4. Counsel for the applicant did not press the issue. He simply stated that he was prepared to establish in fact and in law that the employees affected by the applications fall under the umbrella of the Act having regard to the substantial changes in their duties and responsibilities since the Board’s determination in 1963. Insofar as the procedural question was concerned counsel preferred that the Board proceed with the certification application and hold the reference in abeyance pending the outcome of those proceedings. In the event the applicant’s claim for bargaining rights proved successful the applicant undertook to withdraw the reference and cancel the arbitration proceedings. Furthermore counsel indicated that if the applicant were put to an election it would withdraw the reference under section 95(2).

5. The Board, having regard to the representations of the parties, cannot discern any basis in law or policy at this stage of the certification proceedings for dismissing or otherwise disposing of the applicant’s application for certification. (See for example the discretion conferred upon the Board in the face of concurrent representation applications under section 92(3) of the Act). On the other hand, the Board, in the past, has declined to entertain a reference under section 95(2) where it appears the application was filed “with a view of paving the way toward an application for certification or voluntary recognition”. (See: *The Township of Scarborough case* OLRB M.R. January 1967 842). This policy was adopted in order to prevent parties from seeking the advice of the Board with respect to the status of persons for purposes of the Act without the initial requirement of engaging employees’ representative support. In this regard the Board has indicated that “it was not the intention of the Legislature in using the words ‘any question arises’ in section 95(2) to have the Board

engage in academic exercises...". In our opinion it must have been the intention of the Legislature that the Board's decision under the subsection would serve some useful purpose connected in some way with the bargaining rights of the parties". (See: *The City of St. Catharines Limited* case OLRB M.R. July 1966 270). And indeed, where a decision of the Board as to the status of certain persons would assist the parties in the administration of a collective agreement between them, an application under section 95(2) would appear an appropriate remedy. (See, *The Steel Company of Canada Limited* case OLRB M.R. January 1966 760, *The Algoma Steel Corporation* case OLRB M.R. December 1966 722). Thus, the Board may assume jurisdiction to proceed with a reference under section 95(2) in order to resolve the preliminary or threshold question with respect to the status of a grievor as an employee for purposes of the Act to seek relief by way of the arbitration remedy. (See: *Re Canadian Industries Limited and International Union of District 50, Allied & Technical Workers of The United States and Canada, Local 1328* (1972) 27 D.L.R. (3d) 387).

6. In the circumstances presently before the Board we cannot discern anything untoward in the manner the applicant trade union has chosen to proceed. The mere filing of the application for certification while the reference was still pending is ample evidence that no attempt to circumvent the certification process (or otherwise pave the way for voluntary recognition) was intended. Furthermore, it appears that the persons named in the original reference (and who may be affected by the grievance proceedings) do not necessarily appear on the lists of employees filed by the respondent in reply to the application for certification. In other words, it may very well be that the certification proceedings may have no relevance to a number of persons who may have some interest, having regard to the date of the filing of the reference, in clarifying their employment status for purposes of the Act with respect to the arbitration proceedings. In this regard, it may serve some useful purpose at a later date to determine that particular question. This, of course, is a matter more prudently left for counsel for the applicant to resolve.

7. As a result the Board has not been convinced that it ought to put the applicant to any election whatsoever. Rather in the exercise of our discretion over matters of procedure the Board directs that the reference application should be held in abeyance pending the outcome of the instant application for certification.

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7099-74-R York University Staff Association. (Applicant) v. **York University**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: D. H. Kates, Vice-Chairman, and Board Members P. J. O'Keefe and J. E. C. Robinson, Q.C.

DECISION OF D. H. KATES, VICE-CHAIRMAN, AND BOARD MEMBER P. J. O'KEEFE. December 10, 1975.

1. By decision of the Board dated October 21, 1975 a representation vote was ordered whereby employees comprising the appropriate bargaining unit were given the choice of selecting the applicant as their exclusive bargaining agent. By agreement of the parties approximately fifty employees whose status for purposes of the Act remained in dispute were allowed to participate in the vote but whose ballots were segregated and sealed pending final determination in connection with their eligibility.

2. The challenges to the status of these employees were based on their alleged exercise of managerial functions and/or the confidential capacity of their functions pertaining to matters relating to labour relations for purposes of section 1(3)(b) of the Act. In the former instance, three persons filling the classifications of "assistant to the chairman", "assistant to the master", and "the library supervisor" were selected by the parties as being representative of their respective peer groups. These employees were examined with respect to their duties and responsibilities in supervising the operation of the employer's particular departments. The issue reflected in the representations of the parties in connection with the contents of the Labour Relations Officer's Report was whether the extent and nature of the supervisory duties exercised transcended the managerial line of separation contemplated by the statute. In assessing the duties and responsibilities exercised by persons holding positions of authority the Board is cognizant of the potential for a conflict of interest that may ensue if an employer is denied the exclusive loyalty of the person whose services are the subject matter of dispute. On the other hand, the Board is also mindful that the very design of the Act is to promote collective bargaining amongst employees who fall under the umbrella of its jurisdiction. Because of the "remedial" nature of the legislation the legal onus is placed on the party seeking to exclude a person from the operation of the Act to satisfy the Board of the exercise of managerial functions. (See; *Ajax-Pickering General Hospital case* OLRB M.R. February [1970] 1283 at p1286). The relevant provision of the Act reads as follows:

Section 1(3) Subject to section 80 *for purposes of this Act*, no person shall be deemed to be an employee.

(b) who, in the opinion of the Board, exercises managerial or is employed in a confidential capacity in matters relating to labour relations.

(emphasis added)

3. The Board in determining the issue of the managerial exclusion from the bargaining unit appears to be repeatedly confronted with two general factual circumstances. In the first instance, we are often required to separate the actual from the peripheral in the policy making functions of the enterprise under review. And in the second instance, the Board is usually required to ascertain whether the persons authorized to implement policy decisions once arrived at have been couched with sufficient discretion to justify their exclusion from an appropriate bargaining unit. The more diverse and bureaucratic the enterprise the more diffused and fragmented is the decision making function. In this regard, the Board's task is to separate "the effective and the meaningful" exercise of managerial authority from the supportive and supplemental functionaries without whom prudent decisions could not be made. The tests applied by the Board in distinguishing between the real decision making authority and the collators and conduits of information *in the supervisory context* have recently been reviewed and no useful purpose will be served by repeating them in this decision. (See,

The McIntyre Porcupine Mines Ltd. case OLRB M.R. April [1975] 261). What ought to be emphasized, however, having regard to the peculiar nature of this case, is the unique decision making process of the university setting. The consistent theme reflected throughout the lengthy Labour Relations Officer's Report was the inordinate effort resorted to by the respondent to democratize the decision making process amongst the manifold interest groups that comprise the university community. (See. Bowen H.R. "*University Governance, Workable Participation, Administrative Authority and Public Interest*" [1969] Labour Law Jo. at p.517). The logical extension of these efforts often found expression in the innumerable committees comprised of members holding responsible positions at various levels of the university hierarchy. These committees are essentially designed to deal with particular subject matters pertaining to the operation of the university. The ancillary effect of these committees created the need for meetings accompanied by the preparation of agenda, the research and analysis of problem areas and the recording and filing of minutes. As a result support staff is employed to aid and supplement the efforts of members of committees in forwarding their parochial concerns. Generally the areas of dispute between the parties to the instant application pertained to whether persons occupying these supportive and resource positions ought to be excluded from the appropriate unit because of the exercise of managerial functions.

4. Florence Griffith is employed as administrative assistant to the chairman of the Political Science Department at the respondent university. In this capacity she is answerable to Professor Edgar Dosman, the Chairman. There are forty-five faculty members in the political science department. The department employs three secretaries on a full time basis and one on a part time basis. Two of the secretaries are employed in the graduate and undergraduate sectors respectively; the balance are employed in a general capacity. Miss Griffith explained that she exercises "immediate supervision" only over the latter; the former are experienced secretaries whose work to all intents and purposes is predetermined and assigned to them by the graduate and undergraduate directors. Miss Griffith has direct liaison with Mrs. Joyce Keefe of the personnel department. Prospective department secretaries are assigned to the department by the personnel department as the need arises. Miss Griffith explains their duties, assigns work and supervises their performance. In this regard she corrects mistakes and evaluates generally their performance. With respect to disciplinary recourse for employees, Miss Griffith indicated that she felt the responsibility was the chairman's. She has assigned overtime work, granted time off for personal needs and scheduled vacation. In this respect, Miss Griffith indicated that her discretion in exercising this authority is dictated by "the senate hand book" applied throughout the university in connection with the support staff. Miss Griffith attends meetings of other administrative assistants where matters pertaining to faculty members may be discussed. (The issue of confidential capacity will be discussed later in the decision). The status of staff employees are never made a matter of conversation or deliberation. Miss Griffith also supervises the spending of the department and has signing authority for routine purchases. Her main function in this regard is to prevent the department from exceeding its budgetary ceilings. She has consulted with the chairman with respect to large purchases or with respect to purchases that exceed budgetary allocations for the purpose of obtaining the necessary permission to make the expenditure. Generally a majority of her time is spent attending to administrative duties in support of the chairman and the balance in the exercise of supervisory duties.

5. Miss Olga Cirak is classified as assistant to the Master of Stong College. Professor Virginia Rock. Stong College is both an academic faculty within the Arts Faculty of York

University as well as a student residence. Miss Cirak is answerable to Professor Rock for the performance of her duties and responsibilities and she also "works along with Patrick Grey who is the academic advisor on any matters to do with the security or the physical upkeep of the residence". In a like manner to Miss Griffith, Miss Cirak supervises the master's secretaries assigned to the college. In discharging the security functions of the college, the respondent employs one residence porter and assigns a number of student dons to maintain the upkeep of the college during the evening hours. Miss Cirak in concert with Mr. Grey supervise the porters. Both Mr. Grey and Miss Cirak are contact people in the event of an emergency. Miss Cirak was advised by Professor Rock upon employment that she would be responsible for supervising the budget of the college, allocating rooms for faculty and staff, booking university facilities for the college and the ordering and installation of telephones. She does not assign work to the secretaries or the porters because their duties for the most part are predetermined. In busy periods such as convocation she will ask a secretary "to give me a hand with the mailing". Indeed, only if a secretary was new would "she keep an eye on things". The supervisory duties would be confined to the faculty member or the don for whom the work was being performed. Miss Cirak neither hires nor fires, promotes, transfers or reprimands. All of these matters are reserved to either Professors Rock or Grey. She was consulted on a matter of a secretarial transfer and a merit increase and her opinion to some extent was valued. Nevertheless, in the final analysis the decision to make the transfer or recommend the increase was not hers. In regard to salary increases, time off, vacation, and overtime, employees are governed by the guidelines established in the Senate Handbook. Miss Cirak involves herself in the preparation of the college's annual budget. On the basis of the past year's expenditures (particularly salary, wages, fringe benefits, living allowances, stationary, duplicating and repair costs, faculty, student and college functions etc.), she will attempt to forecast the following year's operating budget. The forecasts for the twenty-one designated accounts of the college are carved out of a predetermined amount that has already been approved and designated to Stong College. In this regard she works hand in hand with Professor Rock who more or less follows the recommendation of Miss Cirak. In regard to maintaining the budget, Miss Cirak oversees expenditures and has signing authority such as approving expense accounts. All of these matters appear to be within prescribed limits. Miss Cirak attends meetings of the officials and student residents of Stong College where matters of common concern to all members of that particular community are discussed. Miss Cirak calculated that ninety-five per cent of her time is spent doing her own work and five per cent supervising other employees. In the context of her overall reliance on Miss Cirak's assistance, Professor Rock confirmed her contribution to the efficient and harmonious operation of Stong College. In one example of budgetary deliberation, a cut in expenses was directed by the respondent's officials. Professor Rock resolved that a salary expense would have to be done away with after various options were presented by Miss Cirak. As a result of this decision, the porter's job was terminated.

6. Miss M. Nadkarni is employed as "head of acquisitions at the Law Library and as such exercises supervisory duties over a number of employees assigned to help discharge her duties." There are two searchers, one order and binding clerk, one junior and senior receiving clerk and two cardex clerks. Basically Miss Nadkarni is responsible for organizing the work of the acquisitions department and co-ordinating the activities of the personnel "so that everything is running smoothly". Once material is preselected for ordering and upon Mr. Halevy's approval the searchers find the material for ordering and once received, the material is catalogued and processed by the cardex clerk. The duties of the employees are predetermined by the inherent nature of their job titles. Miss Nadkarni has altered the

nature of work performed by an employee but these are on rare occasions. She is responsible for "crappy work" leaving the department and therefore has had occasion to correct mistakes as part of her duties for the smooth operation of the department. She did agree she cannot hire without the approval of the Law Librarian but has interviewed prospective employees. On one occasion three persons were interviewed by her alone for a position and her recommendation was accepted by the Law Librarian. Although she was not advised to assess probationary employees nevertheless, Miss Nadkarni would inform the Librarian of her opinion if the employee was unsuitable. Upon the initiative of an employee who requested that a job grade be reviewed Miss Nadkarni was approached by a committee to assess the justification if any for the increase. She was not asked for her recommendation nor did she give one. With respect to discharge Miss Nadkarni would have to seek the approval of the Law Librarian. In this regard, she indicated that her main concern is to correct the mistakes of the employees under her direction. On one occasion a junior receiving clerk proved in her view to be unsatisfactory. Miss Nadkarni recommended that the person should not continue on that job and that recommendation was acted upon by Mr. Halevy. Miss Nadkarni has also recommended a departmental transfer of "an order and binding clerk" to a cardex clerk (at the time of the transfer the latter classification was a higher paying grade). On another occasion Miss Nadkarni recommended upon interviewing four prospective transferees from other departments in the university an appointment which was acted upon by Mr. Halevy. Miss Nadkarni also assumes some responsibility in maintaining the budget ceiling set for the Library in making acquisitions. She attends meetings with other Library Department Heads where matters pertaining to the operation of the Library are discussed. Miss Nadkarni participates in the discussion but does not necessarily make recommendations and if so, her recommendations would not necessarily be acted upon. In any event her recommendations with respect to increases in the Library's budget have usually been met with a fruitless absence of success.

7. The employees who have been reviewed herein in the most past are assigned limited supervisory functions within the ambit of their particular job functions. Each is answerable to an immediate supervisor for their job performance and must on matters of consequence seek their approval. And in other matters pertaining particularly to supervising employees little occasion arises whereby control and direction requires the necessity to exercise disciplinary functions. When employees require time off, or overtime is assigned or vacations are scheduled or salary increases are reviewed, supervisory discretion is restricted to predetermined guidelines of the handbook or university policy. Budgetary functions are restricted to collating and analysing past expenditures in context of future forecasts. Monies are released within predetermined ceilings in excess of which permission must be sought from persons occupying higher positions of authority. These employees perform significant and important functions within the particular branch of the university organization assigned to them by the employer. In concluding that Florence Griffith and Olga Cirak in their capacities as assistant to department chairman and assistant to Master Rock at Stong College do not exercise managerial functions, we do not intend to demean or disparage their invaluable contribution to the university. Nevertheless, as employees they are entitled to rights of representation by the applicant in that we have not been satisfied that they exercise managerial functions for purposes of section 1(3)(b) of the Act. In respect to Miss Nadkarni, the Board is satisfied that in the performance of her general duties of being responsible for the smooth operation of Law Library acquisitions department she has subsumed a managerial function that may very well not have been anticipated in her job description. It appears to us that save for the final approval of the purchase of books and periodicals by

Mr. Halevy, Miss Nadkarni has effective control of the operation of the acquisitions department. The decisions relating to the hiring of employees, the promotion of employees, the transfer of employees and indeed the discharge of employees is effectively performed by Miss Nadkarni upon Mr. Halevy's "rubber stamp". The evidence compels us to conclude that Miss Nadkarni exercises managerial functions within the meaning of section 1(3)(b) of the Act.

8. The balance of the persons disputed by the parties with respect to their employment status for purposes of the Act (inclusive of Miss Griffith and Miss Cirak) were challenged on the basis of their employment capacity in matters relating to confidential information. During the course of counsel's representations on this matter an issue of interpretation with respect to the scope of the application of section 1(3)(b) arose. In a word the question was whether the Legislature intended the exclusion to apply generally to all persons who were materially involved in matters relating to labour relations or restricted to persons, although employed in such a capacity, who are not in any way involved in the performance of their duties with employees comprising the appropriate bargaining unit. Counsel for the applicant submits that the latter interpretation ought to prevail. It is argued that the confidential nature of the employees' duties do not create a conflict-choice dilemma affecting the employees' capacity to function. Any breach of confidence or indiscretion committed during the course of employment, having regard to the inherent nature of the job, would give rise to disciplinary recourse by the employer. Counsel for the employer submitted that the plain meaning of section 1(3)(b) provides that "for purposes of the Act" any persons who exercise managerial functions or is employed in a confidential capacity shall not be treated as "an employee". There are no words of limitation placed on the section that ought to persuade the Board to restrict its thrust to exclusions from the bargaining unit pursuant to an application for certification. In this context, the "conflict of interest" theory allegedly underlying managerial exclusions was not intended to be confined solely to representation applications.

9. The Board upon extensive research of its jurisprudence has discovered that the very same issue was argued in the *Algoma Steel Corporation Limited case* OLRB M.R. June [1970] 365 at p369. In that case an application was filed under section 95(2) as to whether certain persons employed in administrative and managerial classifications were employees for purposes of the Act in that they exercised managerial and/or were employed in a confidential capacity for purposes of section 1(3)(b). Counsel for the respondent urged the Board in making its determinations "to consider whether there was an inherent conflict between the duties and responsibilities which certain of the persons in dispute perform and those performed by bargaining unit employees..." In this regard the respondent was referring to persons in the bargaining unit represented by Local 2251 (a plant unit) as well as those in the bargaining unit (an office unit) represented by the applicant. In response to the argument the Board stated:

"We would first point out that in this application the Board is concerned not only with bargaining unit employees but also with all employees of the respondent regardless of whether or not they are represented by a trade union. With regard to the submission of counsel for the respondent...we would simply state that where a persons' job functions are clearly identified with the interests of management as opposed to rank and file employees, *this is one factor which may make such person an integral part of management.*

The sole question before the Board in this application is whether or not the persons in dispute are employees. In all cases, the issue between the parties was whether or not the persons concerned, on the date of the ruling of the application, exercised managerial functions or were employed in a confidential capacity in matters relating to labour relations. *Section 1(3)(b) of the Labour Relations Act provides that a person who, in the opinion of the Board, fall within either of these categories shall be deemed to be employees for purposes of the Act.*"

10. It therefore appears that the argument submitted by the respondent is more consistent with the plain intention of the Legislature of excluding "all" persons who fall within exclusionary classifications provided under section 1(3)(b). The applicant has not persuaded us that we ought to depart from the interpretation heretofore applied by the Board in its past policy decisions.

11. The parties appeared to be in agreement with respect to the interpretation of the phrase "employed in a confidential capacity in matters relating to labour relations". That is to say the Board must be satisfied of "a regular, material involvement in matters relating to labour relations" to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd. case* OLRB M.R. September [1969] 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board case* OLRB M.R. April [1974] 220). Nor is mere knowledge of matters that may be deemed "confidential" in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See, *The Comtech Group Limited case* OLRB M.R. May [1974] 291). The important test is whether there is consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employees' service to the employer's enterprise. (See, *The Toledo Sale Division of Reliance Electric Limited case* OLRB M.R. June [1974] 406).

12. Before embarking upon an examination of the duties and responsibilities of the disputed persons, some reference ought to be made to the existing collective bargaining patterns at the respondent university. At the date of the filing of the instant application employees engaged in the service and maintenance capacities at the university (referred throughout the Report as "the physical plant unit") are represented by The Canadian Union of Public Employees. Employees assigned to safety and security functions are represented for collective bargaining purposes by Local 1962 of the American Guards Association. The support staff were represented in a loose informal manner by the applicant's negotiation of salaries and other conditions of employment appears to have been established as well as a means of processing grievances with respect to the application and interpretation of any consummated agreement. Finally, members of the faculty appear to be represented by their particular faculty associations with respect to advancing their peculiar claims with the university administration outside a collective bargaining setting.

13. Miss Judy Montgomery is classified as a Programmer/Analyst P. 3 assigned to The Administration Information Systems Department at the respondent university. She is answerable to Perry Skourias, project manager of "the finance team within AIS". In her capacity as a member of "the finance team" Miss Montgomery is responsible for designing.

analysing, writing and thereafter supervising, improving and maintaining a number of programme systems relevant to the operation of the respondent's finance department. In addition to these tasks, Miss Montgomery's duties also involve "special exercises which are not systems in themselves but special applications that come up maybe once or twice or three times a year..." Included amongst the systems that Miss Montgomery designed and continues to be responsible for, is the budget planning system. Examples of "the exercises" she must perform in the course of discharging her duties are "salary increment exercises", "payroll purge exercise", and "CUPE pay increase exercise". The process of writing programme designs for the computers as well as performing the exercises described in the Report necessitates the exposure by Miss Montgomery to information that is inherently of a confidential nature. For example, it is not only the information that is disclosed to her after budgetary matters affecting the university is resolved that may be deemed confidential but also the revisions and adjustments to the programme once designed that may be occasioned by events that at a particular point in time may not be common knowledge. In reaching the conclusion that Miss Montgomery is employed in a confidential capacity within the meaning of section 1(3)(b) was her evidence with respect "to costing out" proposals for salary increases made by CUPE during negotiations with a view to entering into a collective agreement on behalf of "the plant employees". She also indicated to the Board that the costing out of such salary proposals was not necessarily confined to the employees represented by CUPE but by implication also affected salaried employees (namely employees in the appropriate unit herein). The Board is of the view that Miss Montgomery holds the type of position and performs functions related thereto that are so inherently integral to an involvement in confidential data pertaining to labour relations that she ought to be excluded from the appropriate bargaining unit. In a like manner, Miss Lynda Box who is the secretary to the comptroller of the university ought to be excluded. She types minutes and memorandums relating to meetings attended by Mr. MacArthur, the comptroller, and other members of management where subjects relating to the financial budget are discussed. Indeed Miss Box types all of the comptroller's correspondence which may include the minutes of meetings where budgets, insurance, personnel and pensions are discussed. One particular committee meeting (the minutes of which Miss Box typed) related to the designing of information systems that might bear some relevance to the work of Miss Montgomery. In addition Miss Box has access to financial statements of the university that remain confidential until made public by the respondent's Board of Governors. Indeed, it may very well happen that Miss Box would type alterations to the statements prior to public disclosure. As secretary to the comptroller responsible for every phase of the financial operation of the respondent university, Miss Box is so intrinsically exposed to confidential information in matters that may directly or indirectly relate to labour relations as an integral part of her routine job functions that she ought to be excluded from the bargaining unit.

14. Miss Yvonne Heinemann is secretary to the director of safety and security services. Her duties are principally "the typing of letters, confidential letters and ordinary letters...reports from the safety officer, typing of bulletings to open doors and secure doors at the weekend and during the week, and filing...". Generally speaking Miss Heinemann performs all of the secretarial duties required of all members of the safety and security services department. Miss Heinemann stated that "the odd time" she has been required to type letters and memoranda for the director (Mr. Dunne) or her immediate supervisor (Mr. Beckstead) to other members of management (namely, Mr. Mitchell, the personnel director) in connection with security personnel represented under the terms of the collective agreement between the respondent and Local 1962 of The American Guards Association. In this re-

gard, she receives and files Mr. Mitchell's correspondence (opinions) in reply to the department's. Nevertheless, if the correspondence is marked "confidential" Miss Heinemann indicated she would not open it. She has typed letters with respect to recommendations for employee salary increases and promotions and on one occasion she typed a recommendation for her superiors addressed to personnel with respect to the treatment of a grievance filed under the terms of the collective agreement. Although there have been two sets of negotiations since the date of Miss Heinemann's employment she could not recall typing letters with respect to recommendations or positions adopted with respect to proposals for an agreement. She did recall receiving such correspondence from Mr. Mitchell advising her superiors with respect to these matters. In addition, she has typed letters on approximately half a dozen occasions to members of management personnel with respect to whether disciplinary recourse should be taken against employees covered by the security guard agreement. As a result of this uncontradicted evidence, the Board having regard to the position cited in paragraphs 9 and 10 herein, finds that Miss Heinemann ought to be excluded because she is employed in a confidential capacity in matters relating to labour relations under section 1(3)(b) of the Act.

15. Eight secretaries to deans and principals of various departments and colleges at the respondent university were examined with respect to the confidential nature of their employment capacity. In addition, both Miss Griffith and Miss Cirak were interviewed with respect to their confidential capacity as assistant to the department chairman and assistant to the master respectively. Save for the placing of emphasis on peculiar areas of their job experience, their statements as contained in the Labour Relations Officer's Report followed a similar pattern. In order to place the issue in its proper context it ought to be emphasized that each of the persons interviewed were secretaries to people holding responsible positions of variable degree in the university hierarchy. As secretaries their principal duties were performing the functions of filing, collating, typing and other sundry clerical duties consistent with their secretarial responsibilities. Because of the nature of the decision making process of the university (briefly referred to in paragraph 3 herein) their bosses as part of their responsibilities are required to attend committee meetings of various levels of significance and importance. Inherent in the attendance of meetings is the preparation of agendas, the typing of minutes and the filing and collating of data incidental to the subject matter of deliberation. These functions are normally performed by the individual's secretary. Save for isolated incidents related in the one case by Mrs. Marmorek and in the other by Dean G. F. Reed (respondent witness to the examination of Deborah Weeks), problems relating to staff employees or plant employees are very rarely a concern of the dean or principal. The latter are more or less concerned about the smooth operation of their respective departments or colleges (namely, determining course curricula, and resolving faculty and student problems) and the peripheral administrative tasks (namely, financial budgeting) that are an unfortunate but inevitable concomitant to operating a sector of the university.

16. It is clear that in matters relating to the faculty and the budgeting of a department, policy deliberations may very well be initiated at the bottom of the hierarchical structure of the university but are resolved at the top of the pyramid by the Board of Governors. At the various stages of the decision making process various committees (and sub-committees) discuss, analyze and determine a particular policy issue. These committees are often comprised of persons who will be directly affected by the result. The committee's resolution is then referred to the Dean who may or may not approve the committee's recommendation. At this stage the issue may be passed on to the Senate (or a sub-committee thereof)

and then to the President of the University for deliberation by him (or his council or a committee thereof) and thereafter referred to the Board of Governors (or a committee of the Board of Governors) for their final approval. At each stage of the process it is a rare occasion that the persons directly affected by the outcome of the deliberations are not fully aware of the subject matter forming the topic for discussion. At this juncture perhaps an example ought to be referred to illustrative of this particular point.

17. Repeated reference was made in the Labour Relations Officer's Report to innumerable committees dealing with faculty matters. Some that were specifically referred to included The Promotions and Tenure Committee, The Advisory Committee on Appointments, The Faculty Grievance Committee, The Salary Committee (anomaly adjustment of salary) etc. etc. *ad nauseam*. The secretaries to each of the Deans or Principals who attended these committee meetings are directly involved in the typing and clerical process surrounding the deliberations. All of these meetings in one manner or another are attended by the very faculty members (and often students) that stand to gain or lose by the particular action taken pursuant to the committee's discussions. Indeed, if the faculty member is not a member of the committee with respect to the subject matter affecting him, he is advised (in the case of hire, termination, promotion and salary increases etc.) of his potential status both before and after the deliberations. Indeed, in order to assure fairness, an open inquiry is at times embarked upon in the presence of the faculty member prior to any decision adopted with respect to that person's fate. In other words, from the perspective of the functions of the secretary operating at the periphery of this grandiose decision making process, the Board is constrained from concluding any "confidential" basis to the information that they may be exposed to.

18. The process of resolving budgetary problems are conducted with the same candour. The preparation of a department's budgets are based on the previous year's expenditures and a "guestimate" is made with respect to potential increases. This information is hardly confidential in that it pertains to financial statements that are disclosed by the respondent as a quasi-public institution to the public. Once the budget ceiling for a particular department is determined it is referred back to the dean with respect to allocation. Again, a committee of the faculty by its deliberations will determine the programmes that ought to receive financial priority. The secretary who is required to type and collate and organize materials with respect to this process cannot, in our view, be deemed to be employed in a confidential capacity in matters relating to labour relations.

19. Finally, of significant concern to the Board in making its determination on this particular facet of the case was the reference to the exposure by secretaries to the minutes of meetings of The President's Council. Dean Reed described the function of the council. Firstly, the council is composed of the deans of each faculty department and the principals of the colleges comprising the academic structure of the respondent University. Meetings are held on a bi-monthly basis. Minutes of the meetings are recorded and dispatched in due course to the participants. The President's Council in particular is concerned with administrative and structural questions affecting the university. Indeed, it appeared from the comments in the Labour Relations Officer's Report the issues created by implication of the instant application have been made a matter of concern for the Council. In addition to matters of unionization the Council would also discuss budgetary matters and related issues pertaining to the staffing of the university. In all these matters it was suggested that the secretary has access to materials reflecting the specific contents of the deliberations. Dean

Reed particularly emphasized the fact that his secretary would have access to this information. But it appears that in dealing with "the minutia" that is incidental to the Council's deliberations Mrs. Pauline Callan, the administrative officer of the Faculty of Graduate Studies, becomes directly involved. The evidence appears crystal clear that Mrs. Callan is the administrative manager of the faculty and she is privy to most matters of concern to the faculty and the support staff. The Board notes that Mrs. Callan is not on the revised lists of employees and therefore is excluded from the bargaining unit. In a like manner, it was illustrated during the course of the examination of Martha Creary, secretary to the Dean of the Faculty of Fine Arts that the faculty's business officer, Chris Gurney, handled many of the delicate personnel issues that arise with respect to the operation of that faculty. More particularly, Mr. Gurney may be made available and responsible for maintaining the confidentiality of any information emanating from the President's Council. Again Mr. Gurney is not recorded as an employee on the revised lists of employees included in the bargaining unit. In the final analysis the Board is not satisfied that mere access by these secretaries to information pertaining to the President's Council is sufficient to justify a finding that they are employed in a confidential capacity relating to labour relations. Firstly, their exposure to such information is of a very peripheral and limited nature. In most instances they have access to the minutes of the meetings in the sense of opening the mail and depositing them at later time in a file. We are not satisfied having regard to the totality of their duties and responsibilities that the secretary is involved in a regular and material manner in confidential matters relating to labour relations. Secondly, we are satisfied that the secretaries' access to such information is highly susceptible to control in the sense that persons not included in the bargaining unit may be made available to perform the functions performed by the secretary as it may relate to information pertaining to the President's Council. In the final analysis, we have not been satisfied that the secretaries to deans and principals including the assistant to the department head and assistant to the master ought to be excluded from the bargaining unit because they are employed in a confidential capacity in matters relating to labour relations.

20. Having regard to the foregoing the Board is satisfied that the persons included in Schedules A, B and C are included in the appropriate bargaining unit, in that they do not exercise managerial functions and/or are employed in a confidential capacity in matters relating to labour relations under section 1(3)(b) of the Act. And the Board is further satisfied that the persons listed on Schedules D, E, F and G are excluded from the bargaining unit in that they exercise managerial functions and/or are employed in a confidential capacity under section 1(3)(b) of the Act.

21. No statement of objections and desire to make representations has been filed with the Board within the time fixed under subsection 1 of section 45 of the Board's Rules of Procedure following the taking of the representation vote pursuant to the Board's direction of October 21, 1975, in this matter.

22. On the taking of the representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

23. A certificate will issue to the applicant.

24. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement

requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

DECISION OF BOARD MEMBER J. E. C. ROBINSON, Q.C.

2. While I must disassociate myself from certain of the reasoning of the majority as contained in its decision, I am in agreement with the ultimate result of the disposition of the various persons contained therein, except insofar as it pertains to F. Griffith, and the people of which she is representative and of M. Marmorek.

2. In my opinion F. Griffith and the persons contained on Schedule "A" of the majority award should be excluded from the bargaining unit in that they exercise managerial functions and/or are employed in a confidential capacity within the meaning of section 1(3)(b) of The Labour Relations Act.

3. Additionally, I would find that M. Marmorek should be excluded from the bargaining unit in that she is employed in a confidential capacity within the meaning of section 1(3)(b) of The Labour Relations Act.

4. I would so find.

1216-75-R Canadian Union of United Brewery; Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. **Smith Beverages Limited**, (Respondent) v. Group of Employees, (Objectors).

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Chris D. Paliare and Bob Hill for the Applicant; C.G. Smith, Wm. Lyford and N. Allan for the respondent; Rob Watson for the objectors.*

DECISION OF THE BOARD:

1. This is an application for certification.

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4. The Board finds all employees of the respondent company, save and except area managers, foremen, persons above the rank of area manager and foreman, office staff and students employed for the school vacation period, constitutes a unit of employees of the respondent appropriate for collective bargaining.

5. The Board is satisfied on the basis of all the evidence before it that more than fifty five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on November 19, 1975, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of

The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. This is a displacement application whereby the applicant union is seeking to displace an incumbent union as the bargaining agent of the employees in the above defined bargaining unit. The incumbent union is party to a collective agreement with the respondent which expires December 21, 1975. It is the long-standing practice of this Board to order that in these situations a representation vote be taken so as the employees in the bargaining unit may select between the incumbent and the applicant union. The applicant in this case has requested that the Board disregard its long-standing practice and certify the applicant outright because the incumbent is not a trade union within the meaning of the Act and/or, alternatively, "the true wishes of the employees...are not likely to be ascertained" by the taking of a representation vote. The applicant alleged in a letter dated November 21, 1975 that:

1. The incumbent union has intimidated and coerced the employees in the bargaining unit.
2. The incumbent union is an employer dominated union.
3. The employer was responsible for the origination and circulation of a petition in opposition to the applicant.

7. In support of these allegations the applicant called Ms. Gladys Turner to give evidence. She testified that on November 12, 1975 a meeting was called by Mr. R. Watson, the president of the incumbent association which was held that evening on company premises and which was attended by sixteen bargaining unit employees. She stated that Mr. Watson told the meeting firstly that if the applicant union were certified the work week would be reduced to three days and secondly that Mr. Allan, the sales manager, had told him that if the incumbent association were to remain the employees "would get close to what [they] were asking plus half the drug and dental plans". She further testified that a petition was circulated at the meeting the preamble of which was dictated to her by Mr. Watson and which was subsequently signed by all sixteen persons present at the meeting. Ms. Turner placed the petition in her locker overnight and the next morning put it into her purse. She testified that when Mr. Watson approached her and said he wanted to take the petition up to Mr. Lyford, the general manager, she refused to give it to him. Mr. Watson then went upstairs (where the executive offices and the lunchroom are located) for five to ten minutes and then proceeded to the front office where he emerged with a clipboard and began to circulate a second petition. The witness admitted in cross-examination that the association normally used the plant for meetings, that she has participated recently in negotiation with the company on behalf of the incumbent association and that no one from the management of the company had made promises to her.

8. Mr. Robert Hill, an organizer with the applicant union, was also called and testified that on Thursday, November 13, 1975 he spoke to Mr. Watson. He stated that Mr. Watson called him and informed him that the inside group had decided that they did not want the union because Mr. Lyford had said they would only work three days per week. Mr. Watson denied that he had mentioned Mr. Lyford.

9. Mr. Robert Watson testified on his own behalf. He testified that he had stated at the meeting of November 12, 1975 that "there was a possibility" of a three day week in view of a reluctance by the employees to wash windows and clean offices, but denied that he had been told this by anyone within the company. He also denied that he had indicated certain promises had been made by management but rather he asserted that he stated that the incumbent association would "ask for" the dental and drug plans. He was unshaken in cross-examination and, having regard to the onus which attaches to the applicant, the Board is not prepared to find that threats or promises were made by the employer or the incumbent. Under cross-examination Mr. Watson said that he told the employees the purpose of the meeting of November 12 was to have a vote for or against the applicant union and that the notice was spread by word of mouth. This evidence conflicts with that of Mrs. Buckingham who was called by the applicant in reply and testified that, although Mr. Watson told her of the meeting, he did not tell her the purpose of the meeting. With respect to the events which took place on the morning of November 13, Mr. Watson admitted that he had talked with Mr. Lyford when he went upstairs and had told him that he was going to circulate a second petition before the drivers left on deliveries. He testified that Mr. Lyford said to him that "it is up to the people". He also admitted that he had asked Mr. Allan, the sales manager, what the incumbent association should ask for and was quoted a figure. There is no evidence, however, that the figure quoted was conditional on the defeat of the applicant union.

10. With respect to the affairs of the incumbent association, Mr. Watson testified that a new slate of officers had been elected in late September and that the association had formulated amendments to the existing collective agreement and had handed them to the company in early October. The executive of the association had shortly thereafter met with the company and discussed the demands. He testified that \$4.00 per month for all regular bargaining unit employees was deducted and forwarded to the association pursuant to Article V of the current collective agreement and that the incumbent association has about \$1,000 deposited in a bank account.

11. The rationale of the Board in following the practice of ordering a vote in displacement applications is found in the *Canadian John Wood* case, 52 CLLC 16,449 wherein it is stated:

"...Such a course would carry out the thought which motivated the National Board in the *New York Central* case, *supra*, namely, that an organization which holds a collective agreement should not be displaced unless the employees are given an opportunity to mark their ballots in its favour.

Our conclusion in this respect is also in line with our decisions in the *Beach Foundry* case, [¶16,443], the *Purity Bread* case, [¶16,447] and the *Toronto Transportation Commission* case [¶16,448]. The underlying principle in all of these cases is that stability in collective bargaining relations should be promoted to the fullest extent that the law will permit. This case must be distinguished from those cases in which an agreement has run its full course and the trade union or employees' organization party to an agreement has been dissolved or has disintegrated and has thus ceased to exist. *Breihaupt Leather* case, [¶16,446]. In those instances, we would not be inclined to include the name of such an organization on the ballot unless it actually intervened in the

proceedings.” The Board departs from the practice of ordering a vote if a union has slept on its bargaining rights and/or if a union has “ceased to exist”. There is no evidence that the incumbent association has slept on its bargaining rights. The applicant has, however, questioned the status of the incumbent and called evidence in support of an allegation of employer domination. The applicant is in effect saying that the incumbent has “ceased to exist” as a trade union under the Act and must not, therefore, be offered as an alternative on any ballot.

12. Section 94 of the Act states:

“94. Where in any proceeding under this Act the Board has found or finds that an organization of employees is a trade union with the meaning of clause *n* of subsection 1 of section 1, such finding is *prima facie* evidence in any subsequent proceeding under this Act that the organization of employees is a trade union for the purposes of this Act.”

There is a certificate on the status of the incumbent association on file and signed by the Registrar which is *prima facie* evidence of its status pursuant to section 94 of the Act. In the face of section 94 it follows that an onus attaches to the applicant in this matter to call probative evidence which will rebut both the certificate and the evidence of Mr. Watson (para 10) which confirms that the incumbent association has an elected slate of officers, a sizable bank account, and an operative collective agreement which it had commenced to renegotiate with the company prior to this application. (See *Zellers Limited* case [1970] OLRB Mthly. Rep. Nov. at page 815.)

13. The Act is designed to provide trade unions with an independent existence so as they may effectively represent employees in their employment relations. (See sections 5, 12, 40, 56.) The applicant, in its argument in support of its contention that the incumbent is an employer dominated organization, cited firstly the use of company premises for the holding of the association meeting of November 12, 1975 at which the signing of the first petition took place, and secondly the circumstances surrounding the circulation of the second petition during working hours, on company premises and using company paper, clipboard and envelope. The applicant argued that the use of company premises constituted indirect financial assistance. The applicant cited the *Prudential Steel Ltd.* case (Alberta Board) 67 CLLC 16,002 in support of its position. That case is distinguishable from the instant case, however, because of the fact there was no incumbent trade union. The decision of the Board in this matter is, in part, based upon this significant distinction.

14. Before proceeding the Board would point out that the incumbent association has carried on a relationship with the respondent company as the certified bargaining agent of its employees for a number of years. A co-operative spirit may, and very often does, develop between the parties as a collective bargaining relationship matures which in no way lessens the union's effectiveness to represent the bargaining unit employees. The Board refers to such things as the use of company premises for meetings, the use of company offices by union officials, the movement within the work setting of union stewards, the interview of new employees by stewards and even dues check off. Prior to certification any of these manifestations of an on-going relationship could serve as a bar pursuant to section 12 of the Act. Subsequent to certification, however, these activities may be provided for in a collective

agreement or may become part of an accepted practice between the parties but they in no way diminish or destroy the status of the trade union.

15. The Board is not prepared to find that the use of company premises for meetings or the unimpeded movement within the work place of Mr. Watson, the association President, are grounds to support a finding that the applicant has rebutted the *prima facie* evidence of the incumbent's status within the context of an on-going relationship.

16. The evidence before the Board with respect to the circulation of the second petition might well be sufficient to support a finding of management involvement in its circulation. It is not, however, sufficient to cause the incumbent to lose its status as a trade union in the face of the certificate of status and other evidence which establishes that the incumbent has a freely elected slate of officers, has an existing collective agreement, has entered into negotiations for the renewal of that agreement, and has a sizable treasury. There is further evidence which suggests that the incumbent has attempted to use the applicant as a lever in its negotiations with the company; not an altogether ethical approach but one which bespeaks an armslength relationship with the company. The Board is not prepared to find that the incumbent is no longer a trade union pursuant to section 1(1)(n) of the Act.

17. The applicant has argued in the alternative that the Board should in the circumstances of this case invoke section 7(a) and dispense with a vote because it would not reveal the true wishes of the employees. Section 7(a) reads:

"7a. Where an employer or employers' organization contravenes the Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

18. In the circumstances of this case it is not necessary for the Board to consider the mechanics and indeed the appropriateness of applying section 7(a) in a displacement situation. Neither is it necessary for the Board to make a finding with respect to unlawful activity. In the circumstances of this case the Board is not convinced that the true wishes of the employees would not likely be ascertained by the taking of a representation vote.

19. The evidence before the Board calls into question the voluntary nature of the petition(s). It is not necessary in this case, however, for the Board to determine, for the purposes of giving weight to the membership evidence, if the petition(s) reflect the true wishes of the employees. The question before the Board is whether the true wishes of the employees would be ascertained by the taking of a representation vote. A distinction must be drawn between the criteria used to determine if a petition reflects the true wishes and the criteria used to determine if a secret ballot would reflect the true wishes. If an employee logically suspects that his employer will become aware of either his signing or his refusal to sign a petition this suspicion can effectively thwart his free expression as represented by his signature on a petition. (See the *Pigott* case, *supra*, and the *CCH Canadian Limited* case [1974] OLRB

Mthly. Rep. Jan. 19.) In a secret ballot, however, an employee is assured that his choice will not be revealed to his employer and therefore the evidence relied upon by the Board in exercising its discretion to invoke section 7(a) usually goes to such unlawful activities as coercion, intimidation, threats, promises or undue influence and very often a pattern of such unlawful activity which would cause an employee not to express his true wishes on a secret ballot. (See *Paragon Tools Ltd.*, 70 CLLC 16,012; *Darrigo Foods* case [1975] OLRB Mthly. Rep. June; *Marel Contractors* case [1968] OLRB Mthly. Rep. Apr. 43; *Bell and Howell* case [1968] OLRB Mthly. Rep. Oct. 695; and *Rothway Concentrators* case [1968] OLRB Mthly. Rep. Dec. 918.) The evidence before the Board in this case does not in the opinion of the Board, support a finding that a representation vote would not reveal the true wishes of the employees.

20. In addition, the Board notes the fact that six of the ten persons who had signed union membership cards and then signed the petition in opposition to the union, dated November 12, 1975, forwarded to the Board documents revoking their signatures on the petition. These documents were dated November 16, 1975 and read, in part:

"Of my own free will I have reconsidered and hereby request that the Ontario Labour Relations Board disregard my signature on any statement of desire filed with the Board in opposition to this application for certification..."

Although the Board was not called upon to hear oral evidence as to the manner in which these documents were conceived, the Board has verified that the signatures affixed to these documents correspond with the appropriate specimen signatures forwarded to the Board by the respondent employer.

21. Having regard to the nature of the evidence before it, and in particular to the documents of revocation referred to in para. 21, the Board is not convinced that the true wishes of the employees would not likely be ascertained by the taking of a representation vote. Accordingly, the Board follows its standard practice in these matters and orders that a representation vote be taken. Those eligible to vote are all employees of the respondent who come within the bargaining unit defined in para. 4 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date on which the vote is taken.

22. Voters will be asked to choose between the applicant and Smith Beverages Employees Association.

23. The matter is referred to the Registrar.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1975

APPLICATIONS FOR CERTIFICATION

BARGAINING AGENTS CERTIFIED DURING DECEMBER

No Vote Conducted

0705-75-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Clearwater Chrysler Dodge Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Windsor, save and except foremen, persons above the rank of foreman, salesmen and office staff." (17 employees in the unit). (For the purpose of clarity, the exclusion from the bargaining unit of salesmen did not include the inside parts counter salesmen or the inside wholesale parts salesmen. Outside parts salesmen and car salesmen are included in the exclusion of salesmen.)

0746-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bechtel Canada Limited (Respondent).

Unit: "all employees of the respondent working as instrumentmen, rodmen, chainmen and party chief in the County of Lambton, save and except the field engineer and persons above the rank of field engineer." (3 employees in the unit).

0761-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Alto Construction Services Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0883-75-R: Office & Professional Employees International Union, Local #343 AFL-CIO-CLC (Applicant) v. Canadian Air Line Flight Attendants' Association (Respondent).

Unit: "all clerical employees and business representatives of the respondent in the municipality of Metropolitan Toronto to be a unit of employees of the respondent appropriate for collective bargaining." (2 employees in the unit).

1047-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Budd Automotive Company of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the company in its manufacturing offices located in the City of Kitchener save and except supervisors, persons above the rank of supervisor. Budget

Analyst, Planning Co-ordinator, Senior Financial Services Clerk, employees in the Personnel Department, Methods & Standards Technicians, Senior Methods & Standards Technicians, Time Study Technicians, secretary to each of the President, the Plant Manager, the Comptroller, Manager of Quality Control, Industrial Engineering Department, persons regularly employed for not more than 24 hours Per week, students employed during the school vacation period and students employed on a co-operative training program.” (99 employees in the unit). (*Having regard to the agreement of the parties*).

1122-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UE) (Applicant) v. Mack Trucks Canada Limited (Respondent).

Unit: “all office, clerical and technical employees of the respondent, Oakville Assembly Plant at Oakville, save and except supervisors, those above the rank of supervisor, Senior Buyer, Senior Expediter, Cost Analyst in Accounting, secretary to the Plant Manager and Assistant Plant Manager; secretary to the industrial relations manager; secretary to the Production Superintendent; secretary to the Comptroller and the plant nurse.” (80 employees in the unit). (*Having regard to the agreement of the parties*).

1198-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Ace Builders (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-workin8 foreman.” (4 employees in the unit).

1217-75-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Newcastle (Respondent).

Unit: “all office, clerical and technical employees of the Corporation of the Town of Newcastle, save and except Secretary to the Clerk, the Planning Director, Office Manager – By-Law Enforcement Officer, Recreation Director, Treasurer, Chief Building Inspector, Program Director, Deputy Treasurer – Tax Collector, Deputy Clerk and persons above the rank of Deputy Clerk, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (18 employees in the Unit).

1218-75-R: Local Union 2345 International Brotherhood of Electrical Workers, AFL CIO CLC (Applicant) v. Onward Manufacturing Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of Onward Manufacturing Company Limited, Kitchener, Ontario, save and except foremen, persons above the rank of foreman and office staff.” (54 employees in the unit). (*Having regard to the agreement of the parties*).

1225-75-R: International Leather Goods, Plastic and Novelty Workers Union Local 8 (Applicant) v. Ray Plastics Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, Persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (68 employees in the unit). (*Having regard to the agreement of the parties*).

1232-75-R: Union of General Magnetic Products of Canada Ltd. Employees (Applicant) v. General Magnetic Products of Canada Ltd. (Respondent).

Unit: "all the employees of General Magnetic Products of Canada Ltd. in the Town of Hawkesbury save and except foremen, persons above the rank of foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during school vacation." (25 employees in the unit).

1233-75-R: International Association of Machinists and Aerospace Workers (Applicant) v. Flex-O-Lite of Canada Ltd (Respondent).

Unit: "all employees of the respondent employed in the City of St. Thomas, save and except foremen, persons above the rank of foreman, office and sales staff, technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in the unit).

1248-75-R: The Hotels, Clubs, Restaurants, Taverns Employees' Union Local 261 (Applicant) v. Canada Catering Co. Limited (Respondent).

Unit: "all employees of the respondent at the cafeteria, Taxation Data Centre, 875 Heron Road, Ottawa, Ontario save and except manager, Persons above the rank of manager, executive chef and office staff." (21 employees in the unit). (*Having regard to the agreement of the parties*).

1263-75-R: Laborers International Union of North America, Local 527 (Applicant) v. Frieberg Construction Corporation Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1266-75-R: United Steelworkers of America (Applicant) v. Wyandotte Chemical of Canada Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, laboratory technicians and students employed during the summer vacation." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1272-75-R: Pattern Makers League of North America Toronto Association (Applicant) v. Toronto Pattern Works Ltd. (Respondent).

Unit: "all Patternmakers and Patternmakers' apprentices in the employ of the respondent in Metropolitan Toronto, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees in the respondent appropriate for collective bargaining." (13 employees in the unit). (*Having regard to the agreement of the parties*).

1274-75-R: International Association of Bridge Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Irwin Ready Mix Concrete, a division of Canfarge Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the District of Thunder Bay, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1279-75-R: Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Pop Shoppes (Hamilton) Limited (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, those above the rank of foreman, office, sales staff and persons regularly employed for not more than 24 hours per week." (12 employees in the unit).

1280-75-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Enrico Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Waterloo, Ontario save and except supervisors, persons above the rank of supervisor, office and sales staff, persons employed for not more than twenty-four hours per week, and students employed during the school vacation period." (98 employees in the unit). (*Having regard to the agreement of the parties*).

1283-75-R: Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. Elwood R. Little Electrical Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1284-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. E. J. Wright Central Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1286-75-R: International Union of Doll & Toy Workers of the U.S. & Canada (Applicant) v. Slater Electric (Canada) Limited (Respondent).

Unit: "all employees of the respondent at Cornwall, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff and persons who are regularly employed for not more than twenty-four hours per week." (3 employees in the unit).

1287-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. H. O. Trerice Co. (Respondent).

Unit: "all employees of the Company at Windsor, Ontario, save and except office and sales staff, foremen, and persons above the rank of foreman." (7 employees in the unit).

1296-75-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. The Board of Trustees of The Roman Catholic Separate Schools for the City of Windsor (Respondent).

Unit: "all employees of The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor, regularly employed for not more than 24 hours per week, save and except foremen, persons above the rank of foreman, office staff, professional teaching staff, teacher aids and persons covered by a subsisting collective agreement." (37 employees in the unit).

1297-75-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. King Steel Fabricators Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1299-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Capital Paving Limited (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1301-75-R: International Union of Operating Engineers Local 793 (Applicant) v. Capital Paving Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Brant and Norfolk engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

1309-75-R: RCA Victor Employees' Association (Applicant) v. RCA Limited (Respondent).

Unit: "all employees of the respondent at London, save and except managers, administrators, persons above the rank of manager and administrator." (7 employees in the unit). (*Having regard to the agreement of the parties*).

1310-75-R: RCA Victor Employees Association (Applicant) v. RCA Limited, Central Region, Commercial Service Division, 7171 Torbram Road, Units 44-45, Mississauga, Ontario, L4T 3W4 (Respondent).

Unit: "all employees of the respondent at Mississauga, save and except managers, administrators, persons above the rank of manager and administrator, salesmen, commercial systems technicians and installers." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1313-75-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coulter & Sons (Windsor) Ltd. (Respondent).

Unit: "all employees of the respondent company at Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and persons employed for not more than twenty-four hours Per week." (12 employees in the unit).

1316-75-R: Office and Professional Employees International Union, Local 343 (Applicant) v. The Board of Education for the City of Hamilton (Respondent) v. Group of Employees (Objectors).

Unit #1: "all office and clerical employees employed by the respondent in secondary schools in Hamilton save and except supervisors, persons above the rank of supervisor, administrative assistants, teacher aides and persons regularly employed for not more than twenty-four hours per week." (192 employees in the unit). (*Having regard to the agreement of the parties*). (*Certified*).

Unit #2: "all office and clerical employees employed by the respondent in vocational schools in Hamilton save and except supervisors, persons above the rank of supervisor, administrative assistants, teacher aides and Persons regularly employed for not more than twenty-four hours per week." (37 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #3: "all office and clerical employees employed by the respondent in elementary and retrainable retarded schools in Hamilton save and except supervisors, persons above the rank of supervisor, administrative assistants, teacher aides and persons regularly employed for not more than twenty-four hours per week." (2 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

1326-75-R: Service Employees Union Local 210, Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Christian Care Centres of Leamington Limited carrying on business under the name of The Leamington Nursing Home (Respondent).

Unit: "all employees of the Leamington Nursing Home located at 24 Franklin Road, Leamington, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foreman, activities director, those above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week, students employed during school vacation period." (55 employees in the unit). (*Having regard to the agreement of the parties*).

1329-75-R: International Brotherhood of Painters & Allied Trades Local Union 1904 (Applicant) v. C. H. Heist Industrial Services (Canada) Ltd. (Respondent) v. International Brotherhood of Painters and Allied Trades, AFL-CIO, Local 1487 (Intervener).

Unit: "all employees working in and out of the respondent's office at Copper Cliff, save and except foremen, persons above the rank of foreman, office and sales staff and employees covered by a subsisting collective agreement between the Labour Bureau Painting and Decorating Contractors of Ontario and the Ontario Council of the International Brotherhood of Painters & Allied Trades to which C. H. Heist (Canada) Limited is a signatory." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1333-75-R: International Brotherhood of Painters and Allied Trades Local Union – 1891 (Applicant) v. Upton Lathing Limited (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (For the purposes of clarity, the Board declared that drywall tapers are included in the bargaining unit.).

1338-75-R: Canadian Union of Public Employees (Applicant) v. York Regional Land Division Committee (Respondent).

Unit: "all office and clerical employees of the respondent employed in the Land Division, save and except Secretary-Treasurer, and Assistant Secretary-Treasurer." (6 employees in the unit).

1345-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Odorico Construction Company Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and

the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and Persons above the rank of non-working foreman.” (22 employees in the unit).

1346-75-R: International Beverage Dispensers’ and Bartenders’ Union Local 280 of the Hotel and Restaurant Employees’ and Bartenders’ International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. Boulevard Inn Inc. (Respondent).

Unit: “all tapmen, bartenders, alcoholic beverage waiters and waitresses, bar-boys and improvers employed by the respondent at the New Toronto Hotel, 2847 Lakeshore Blvd., West Etobicoke, Ontario, save and except assistant manager, persons above the rank of assistant manager, office and sales staff.” (6 employees in the unit). (*Having regard to the agreement of the parties*).

1348-75-R: Pattern Makers League of North America Toronto Association (Applicant) v. Modern Pattern Works Limited (Respondent).

Unit: “all patternmakers and their apprentices in the employ of the respondent in Metropolitan Toronto save and except non-working foremen, persons above the rank of non-working foreman.” (24 employees in the unit). (*Having regard to the agreement of the parties*).

1352-75-R: International Association of Bridge, Structural & Ornamental Iron Workers – Local Union #700 (Applicant) v. Bechtel Canada Limited (Respondent).

Unit: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman.” (11 employees in the unit).

1353-75-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Lawrence Avenue Investments Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1354-75-R: United Brotherhood of Carpenters and Joiners of America Local 38 (Applicant) v. Cafagna Brothers Construction Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1355-75-R: Pattern Makers League of North America Toronto Association (Applicant) v. Ontario Pattern Works Ltd. (Respondent).

Unit: “all patternmakers and patternmakers apprentices in the employ of the Respondent in Metropolitan Toronto save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Having regard to the agreement of the parties*).

1357-75-R: International Union of Operating Engineers. Local 793 (Applicant) v. Acme Building and Construction Ltd. (Respondent).

Unit: "all instrumentmen, rodmen, chainmen and party chief in the employ of the respondent within a fifty mile radius of the Timmins Federal Building, save and except field engineers and persons above the rank of field engineer." (4 employees in the unit).

1374-75-R: Upholsterers' International Union of North America, AFL-CIO (Applicant) v. Nesting Furniture Limited (Respondent).

Unit: "all employees of the respondent at Orono, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1381-75-R: Thunder Bay Lodge 1120, International Association of Machinists and Aerospace Workers (Applicant) v. Arnie's Limited (Respondent).

Unit: "all employees of Arnie's Limited at Thunder Bay, Ontario, save and except foremen, persons above the rank of foreman, office staff and automobile sales staff." (10 employees in the unit).

1382-75-R: Local #742 of the International Brotherhood of Electrical Workers (Applicant) v. Hydro-Electric Commission of the City of Pembroke (Respondent).

Unit: "all office employees of the respondent employed at the office of the Hydro-Electric Commission of the City of Pembroke save and except (Supervisor), those above the rank of (Supervisor), Operation Manager, Office Manager, the secretaries to each of the Operation Manager and Office Manager, those employees presently covered by an existing collective agreement between the respondent and the International Brotherhood of Electrical Workers Local #742, persons who are regularly employed for not more than 24 hours per week and students employed during the school vacation periods." (6 employees in the unit). (*On agreement of the parties*).

1383-75-R: International Brotherhood of Painters and Allied Trades, Local No. 1824 (Applicant) v. Fulton Glass and Aluminum Ltd. (Respondent).

Unit: "all glaziers and glaziers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1386-75-R: Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Applicant) v. Silverwood Dairies, Sudbury Branch, Division of Silverwood Industries Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Sudbury, save and except office manager, persons above the rank of office manager, sales personnel, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (2 employees in the unit).

1387-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Omar Carpentry Company (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

1393-75-R: Canadian Union of Public Employees (Applicant) v. Oxford Private Hospital and Oxford Private Hospital Annex (Respondent).

Unit: "all employees of the respondent, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the ranks of supervisor & foreman, persons covered by a subsisting collective agreement between the International Union of Operating Engineers, Local 796, office & clerical staff, persons regularly employed for not more than 24 hrs./week & students employed during school vacation period." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1400-75-RL United Steelworkers of America (Applicant) v. Curtis Harris Industries Limited (Respondent).

Unit: "all employees of Curtis Harris Industries Limited at Cobourg, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and persons employed for not more than twenty-four hours per week and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1402-75-R: Hotel & Restaurant Employees & Bartenders International Union Local 604, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Trent Inn Hotel (Respondent).

Unit: "all employees of the respondent at Trent Inn Hotel, 173 Charlotte St., Peterborough, Ont., save and except manager and those above the rank of manager." (45 employees in the unit).

1411-75-R: The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Heather & Little Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1442-75-R: International Brotherhood of Electrical Workers Local Union 115 (Applicant) v. Vincent Bernard Electric Limited Company (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in Prince Edward County and the Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the Townships of Percy and Cramahe and all lands east thereof in the United Counties of Northumberland and Durham, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1450-75-R: Operative Plasterers and Cement Masons' International Association of the United States and Canada, Local Union # 124 (Applicant) v. J. P. Drywall (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (For the purposes of clarity, the Board declared that drywall tapers are included in the bargaining unit.).

1453-75-R: Local Union 1190, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Canton Carpenter (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of thee respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0869-75-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Northdown Drywall & Construction Limited (Respondent) v. Marble Masons & Tile Layers, Union No. 31, (Intervener #1) v. Locals 48 and 117 O.P. & C.M.I.A. (Intervener #2).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering, in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees in the unit).

Number of names of persons on voters' list		21
Number of persons who cast ballots		20
Number of ballots marked in favour of applicant	20	
Number of ballots marked in favour of intervener #1	0	

1017-75-R: Canadian Union of Public Employees (Applicant) v. Regional Municipality of York (Respondent).

Unit: "all outside employees of the respondent in the maintenance division of the engineering department, save and except supervisors, persons above the rank of supervisor, professional engineers, office, clerical and technical employees, students employed during the school vacation period, and persons covered by subsisting collective agreements." (57 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		68
Number of persons who cast ballots		66
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	54	
Number of segregated ballots cast by persons whose names appear on voters' list	11	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
BALLOT BOX SEALED		

Applications Certified Subsequent to Post-Hearing Vote

7099-74-R: York University Staff Association (Applicant) v. York University (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto at York campus and Glendon College performing office, clerical, laboratory or technical work, save and except supervisors persons

above the rank of supervisor, all academic appointees of the University including faculty, teaching staff and graduate students, all persons employed in a professional capacity including those employed in the fields of engineering, accounting, library science, medicine and nursing, all persons employed in student counselling in the classifications of counsellor, senior counsellor, counselling officer, faculty of graduate studies, student advisor, program supervisor, project supervisor and project associate, all persons paid from other than Operating or Ancillary funds, all persons employed in the Department of Personnel Services and all persons employed outside of the department in the classifications of personnel co-ordinator, officer manager-personnel assistant and director of accounts and personnel, all persons employed in the offices of the president, vice-presidents and assistant vice-presidents; employees employed in the offices of the Secretary of the University and Director of financial planning in the classification of Assistant, all assistants and administrative assistants to deans, directors, department chairmen and college masters (the classifications of department chairmen and college masters may be included or excluded depending on the disposition of those disputed classifications), all confidential programmers at the level of P-3 or above employed in the department of management information systems (this exclusion may be included or excluded depending on the disposition of the disputed classifications), students employed during the school vacation period, all persons regularly employed for not more than 24 hours per week, all employees covered by subsisting collective agreements.” (1021 employees in the unit).

Number of names of persons on revised voters' list	1056
Number of persons who cast ballots	805
Ballots segregated and not counted	43
Number of spoiled ballots	5
Number of ballots marked in favour of applicant	599
Number of ballots marked against applicant	158

0520-75-R: Canadian Food and Allied Workers Local 725, chartered by Amalgamated Meat Cutters and Butcher Workmen of North America, A.F.L., C.I.O., C.L.C. (Applicant) v. S. S. Kresge Company Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: “all employees of the Respondent at its K Mart Division retail stores in the City of Windsor save and except Department Managers, persons above the rank of Department Manager, including Operational Assistant Management Trainees, Security Guards, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (162 employees in the unit).

Number of names of persons on revised voters' list	158
Number of persons who cast ballots	155
Ballots segregated and not counted	9
Number of ballots marked in favour of applicant	87
Number of ballots marked against applicant	59

Unit #2: “all employees of the Respondent at its K Mart Division retail stores in the City of Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except Department Managers, persons above the rank of Department Manager, including Operational Assistant Management Trainees and Security Guards.” (174 employees in the unit).

Number of names of persons on revised voters' list	154
Number of persons who cast ballots	150
Ballots segregated and not counted	4
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	85
Number of ballots marked against applicant	59

1010-75-R: Civil Service Association of Ontario, Inc. (Applicant) v. Scarborough General Hospital (Respondent).

Unit: "all office and clerical employees of the respondent employed in Scarborough, Ontario, save and except supervisors and those above such rank, students employed during the school vacation period, secretaries to the Administrator and Assistant Administrator (two), Comptroller, Director of Nursing and Personnel Director (two)." (230 employees in the unit).

Number of names of persons on revised voters' list		219
Number of persons who cast ballots	134	
Number of ballots segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	84	
Number of ballots marked against applicant	48	

1060-75-R: Canadian Union of Public Employees (Applicant) v. The Committee of Management of the Teck Pioneer Residence, Kirkland Lake, Ontario (Respondent).

Unit: "all employees of the respondent at Kirkland Lake regularly employed for not more than 24 hours per week in its Home for the Aged, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, occupational therapists, physiotherapists, and office staff, and persons covered by a subsisting collective agreement between The Committee of Management of The Teck Pioneer Residence, Kirkland Lake, Ontario, and The Canadian Union of Public Employees, and its Local 1704, C.L.C." (13 employees in the unit).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	11	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	10	
Number of ballots marked against applicant	1	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0491-75-R: Local Union 1687 International Brotherhood of Electrical Workers (Applicant) v. M. G. Burke Investments Limited (Respondent). (5 employees).

0660-75-R: Retail Clerks International Association (Applicant) v. G. Tambllyn Limited (Respondent).

Unit: "all pharmacy interns employed by the respondent at its retail stores in Metropolitan Toronto, save and except persons who are regularly employed for not more than 24 hours per week." (74 employees in the unit).

0752-75-R: Retail Clerks International Association (Applicant) v. G. Tambllyn Limited (Respondent). (13 employees).

0996-75-R: The Carpenters' District Council of Toronto and vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227 and 3233 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Folco Construction Equipment Limited (Respondent). (6 employees).

1157-75-R: Oil Chemical & Atomic Workers International Union (Applicant) v. Wiltshire Catering Division of J.V. Wiltshire Ltd. (Respondent). (11 employees).

1183-75-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Eaglewood Construction Co. Limited & Vin-Ton Contracting Limited (Respondent). (no employees).

1237-75-R: Service Employees Union, Local 478, AFL-CIO-CLC (Applicant) v. Sensenbrenner Hospital (Respondent). (68 employees).

1269-75-R: The International Brotherhood of Painters and Allied Trades Local Union 1904 (Applicant) v. Carrington's Building Centre Limited (Respondent) v. Labourers International Union of North America, Local 493 (Intervener). (8 employees).

1283-75-R: Local Union 1687 of the International Brotherhood of Electrical Workers (Applicant) v. Elwood R. Little Electrical Limited (Respondent). (3 employees).

1290-75-R: The Millwright District Council of Ontario United Brotherhood of Carpenters and Joiners of America (Applicant) v. E. T. S. Mechanical Limited (Respondent). (2 employees).

1372-75-R: Upholsterers' International Union of North America, AFL-CIO (Applicant) v. Curvply Wood Products (Respondent) v. Group of Employees (Objectors). (70 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

7574-74-R: United Steelworkers of America (Applicant) v. Baycoat Limited (Respondent).

Voting Constituency: "All employees of the respondent Company at Hamilton save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and security guards." (136 employees).

Number of names of persons on voters list	128
Number of persons who cast ballots	121
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	98

0953-75-R: Cambridge Electrohome Employees' Association (Applicant) v. Electrohome Limited (Respondent) v. International Brotherhood of Electrical Workers, Local 2345 (Intervener).

Voting Constituency: "All employees of Electrohome Limited at its Cambridge Galt plant, save and except supervisors, chief engineers, persons above the rank of supervisors and chief engineers, security guards, sales and office staff, persons regularly employed for not more than fifteen (15) hours per week, students, stationary engineers and persons primarily engaged as their helpers in the boiler room, and all persons employed in the following classifications: Components Technician, Cost Reduction Technician, Draftsman, Driver Clerk, Final Assembly Project Technician, Industrial Engineer, Jr. Components Technician, Jr. Designer, Lab Technician, Mail Clerk, Maintenance Evaluator,

Mechanical Draftsman, Mechanical Technician, Methods and Plant Layout Engineer, Model Maker, Model Shop Specialist, Model Shop Technician, Packaging Technician, Plant Engineering Technologist, Product Reliability Tech., Production Control Clerk, Production Control Scheduler, Production Engineering Draftsman, Production Eng., Technician, Production Scheduler, Production Schedule Planner, Quality Audit Technician Quality Control Coordinator, Quality Control Inc. Insp. Tech., Quality Control Technician, Receiving Clerk, Sample Set Assembler, Sr. Lab Technician, Standards Breakdown Technician, Standards Technician and Tool Designer." (254 employees).

Number of names of persons on revised voters' list	174
Number of persons who cast ballots	155
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	55
Number of ballots marked in favour of intervener	99

1062-75-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Westwood Air Freight Limited (Respondent).

Voting Constituency: "All employees of the respondent working at or out of Toronto International Airport Mississauga, Ontario save and except Foremen those above the rank of foreman, office and sales staff and those employees regularly employed for not more than twenty-four hours per week and students employed during their school vacation period." (14 employees).

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	8

1169-75-R: Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Applicant) v. Cochrane-Dunlop Limited (Respondent).

Voting Constituency: "All office and clerical employees of the respondent in Sudbury, Ontario, save and except the assistant manager, persons above the rank of assistant manager, a personal secretary to the branch manager, pricing department manager, and outside salesmen, cleaning persons, and persons employed not more than 24 hours per week, and students employed during their school vacation period, and persons covered by an existing collective agreement." (24 employees).

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	24
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	12

1208-75-R: Textile Workers Union of America, AFL-CIO-CLC (Applicant) v. Waterloo Spinning Mills Limited (Respondent) v. Kraus Carpet Employees Association (Intervener).

Voting Constituency: "All employees of the respondent at its plant in Waterloo Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (108 employees).

Number of names of persons on list as originally prepared by employer		96
Number of persons who cast ballots	91	
Number of spoiled ballots	3	
Number of ballots marked in favour of applicant	43	
Number of ballots marked in favour of intervener	45	

Certification Dismissed Subsequent to Post-Hearing Vote

0880-75-R: International Molders & Allied Workers Union (Applicant) v. London Salvage & Trading Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at London, save and except foremen, persons above the rank of foreman and office staff." (16 employees in the unit).

Number of names of persons on voters' list		15
Number of persons who cast ballots		15
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant	14	

0910-75-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Canadianna Nursing Homes Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, professional medical staff, office staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (78 employees in the unit).

Number of names of persons on revised voters' list		68
Number of persons who cast ballots	58	
Number of ballots marked in favour of applicant	13	
Number of ballots marked against applicant	45	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1051-75-R: Retail Clerks International Association (Applicant) v. Credit Bureau of Kitchener - Waterloo Ltd. (Respondent) v. Group of Employees (Objectors). (26 employees).

1213-75-R: Carleton University Support Staff Association (Applicant) c. Carlton University (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener) v. Group of Employees (Objectors). (780 employees).

1221-75-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Romano Texture Spray (Respondent). (13 employees).

1262-75-R: Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 3227 and 3233 (Applicant) v. Division Construction Limited (Respondent). (11 employees).

1271-75-R: United Steelworkers of America (Applicant) v. Alcan Building Products, Door and Window Division (Respondent). (18 employees).

1276-75-R: Labourers International Union of North America Local 491 (Applicant) v. Northeast Contracting Company (Respondent). (10 employees).

1300-75-R: International Union of Operating Engineers, Local 793 (Applicant) v. Capital Paving Limited (Respondent) v. Group of Employees (Objectors). (5 employees).

1312-75-R: Labourers' International Union of North America Local 1081 (Applicant) v. Capital Paving Limited (Respondent) v. Employee (Objector). (30 employees).

1315-75-R: United Steelworkers of America (Applicant) v. Rheem Canada Limited (Respondent). (4 employees).

1330-75-R: The Millwright District Council of Ontario (Applicant) v. Foley Supply & Machine Co. (1970) Limited (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Intervener). (2 employees).

1349-75-R: Canadian Bakery & Confectionery Staff Union (Applicant) v. Bakery & Confectionery Workers International Union of America Local 264 (Respondent). (3 employees).

1370-75-R: United Brotherhood of Carpenters and Joiners of America, Local 18, Hamilton, Ontario (Applicant) v. Janin Building and Civil Works Ltd. (Respondent). (2 employees).

1385-75-R: The Association of General Studies Teachers in Hebrew Day Schools (Applicant) v. Eitz Chaim School (Respondent). (28 employees).

1389-75-R: Amalgamated Clothing Workers of America (Applicant) v. Dutch Laundry & Dry Cleaners Limited (Respondent) v. Wholesale and Retail, Laundry & Dry Cleaners of London (Intervener). (12 employees).

1396-75-R: The Canadian Union of Public Employees (Applicant) v. Belle River Public Utilities (Respondent). (8 employees).

1398-75-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1946 (Applicant) v. Jackson Lewis (Respondent). (1 employee).

1428-75-R: Lumber and Sawmill Workers Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Uni-Ram Development Inc. (Respondent). (3 employees).

Applications For Declaration Terminating Bargaining Rights

0513-75-R: Laurie Gould (Applicant) v. United Plant Guard Workers of America Amalgamated Local Union No. 1958 (Respondent) v. Wackenhut of Canada Limited (Intervener). (*Granted*).

Unit: "all security guards employed at or working out of the premises of Wackenhut of Canada Limited at Windsor, in the County of Essex, save and except inspectors, persons above the rank of inspector and students employed during the school vacation period." (118 employees in the unit).

Number of names of persons on revised voters' list		133
Number of persons who cast ballots		110
Number of ballots marked in favour of respondent	51	
Number of ballots marked against respondent	59	

1052-75-R: Ken Bedard, et al (Applicant) v. United Steelworkers of America, Local 16505 (Respondent) v. Trent Valley Sand & Stone Limited (Intervener). (40 employees). (*Dismissed*).

1219-75-R: Brian R. Packer (Applicant) v. Canadian Union of Public Employees (Respondent). (22 employees). (*Terminated*).

1268-75-R: Dryden Paper Company, Limited, Electrical Department Employees (Applicant) v. Local 105 CPU (Respondent) v. Dryden Paper Company, Limited (Intervener). (38 employees). (*Dismissed*).

1318-75-R: Employees of West Lincoln Ambulance Ltd. (Applicant) v. Canadian Union of Public Employees (Respondent) v. West Lincoln Ambulance Limited (Intervener). (8 employees). (*Granted*).

Application For Declaration Of Successor Status

1323-75-R: United Steelworkers of America (Applicant) v. The Newell Manufacturing Company Limited (Respondent) v. Prescott General Workers Union, Local 1582 Canadian Labour Congress (Predecessor Trade Union). (*Granted*).

Application For Declaration That Strike Unlawful

1384-75-U: Labourers International Union of North America, Local 493 (Applicant) v. United Brotherhood of Carpenters and Joiners of America Local 2486 (Respondent). (*Dismissed*).

Applications For Consent To Prosecute Disposed of

0820-75-U: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. Marble Masons, Tile Layers, Terrazzo Workers Union, Local 31, Lathers International Union, Local 562, Agostino Simone, Kenneth Weller, Chester deToni, Dino Morson, Lido DryWall Limited (Respondents). (*Withdrawn*).

0919-75-U: Canadian Union of General Employees (Applicant) v. Toronto Young Men's Christian Association, Central Branch (Respondent). (*Dismissed*).

0920-75-U: Canadian Union of General Employees (Applicant) v. Irving Jacobs, Controller of the Metropolitan Toronto YMCA (Respondent).

- and -

0921-75-U: Canadian Union of General Employees (Applicant) v. Gordon Downs, Regional Director of the Metropolitan Toronto YMCA (Respondent).

- and -

0923-75-U: Canadian Union of General Employees (Applicant) v. William Norman, Vice President of Operations of the Metropolitan Toronto YMCA (Respondent).

- and -

0924-75-U: Canadian Union of General Employees (Applicant) v. Rae Robertson, Director of Personnel of the Metropolitan Toronto YMCA (Respondent).
and

- and -

0925-75-U: Canadian Union of General Employees (Applicant) v. Henry J. Labatte, President of the Metropolitan Toronto YMCA (Respondent). (*Dismissed*).

0922-75-U: Canadian Union of General Employees (Applicant) v. George Butters, Director, of Stop Over Central Branch, Y.M.C.A. (Respondent). (*Dismissed*).

1100-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Wm. Noseworthy Excavating Limited (Respondent). (*Withdrawn*).

1202-75-U: Toronto Newspaper Guild, Local 87, The Newspaper Guild (Applicant) v. Bargain Hunter Press (Respondent). (*Withdrawn*).

1227-75-U: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management Ronald Lester, Colin Short and Morris Alon (Respondents). (*Withdrawn*).

1252-75-U: International Woodworkers of America (Applicant) v. Empire Bentwood Industries Ltd., (Genwood Industries Ltd.). (Respondent). (*Withdrawn*).

1342-75-U: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Louis Ringos (Respondent). (*Withdrawn*).

1344-75-U: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Tom Jones and Sons Limited General Contractors (Respondent). (*Withdrawn*).

1401-75-U: Retail Clerks Union Local 486 (Applicant) v. Tip Top Meat Market Limited (Respondent). (*Withdrawn*).

Complaints Under Section 79 (Unfair Labour Practice)

0833-75-U: Nick Bachiu (Complainant) v. United Steelworkers of America, Local 1005 (Respondent) v. The Steel Company of Canada Limited (Employer). (*Dismissed*).

0846-75-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Catalano Produce Ltd. (Respondent). (*Dismissed*).

- 0854-75-U:** Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Catalano Produce Ltd. (Respondent). (*Dismissed*).
- 0950-75-U:** Claude Browne (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent) v. Canadian Workers Union (Intervener). (*Direction*).
- 1138-75-U:** Retail, Wholesale and Department Store Union, AFL-CIO:CLC (Complainant) v. Rockland St. Denis I.G.A. (Respondent). (*Dismissed*).
- 1172-75-U:** Frank Alfred Schulte (Complainant) v. Teamsters Trade Union Local 647 (Respondent). (*Withdrawn*).
- 1203-75-U:** Toronto Newspaper Build, Local 87, The Newspaper Guild (Complainant) v. Bargain Hunter Press (Respondent). (*Terminated*).
- 1230-75-U:** United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Complainant) v. York Bag Co. Ltd., Kroypane Plastics Ltd., Rigidflex Canada Ltd. (Respondent). (*Withdrawn*).
- 1251-75-U:** International Woodworkers of America (Complainant) v. Empire Bentwood Industries Ltd. (Genwood Industries Ltd.) (Respondent). (*Withdrawn*).
- 1267-75-U:** Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Provincial Sanitation Services (Respondent). (*Withdrawn*).
- 1270-75-U:** John Venditelli (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders Blacksmiths, Local 680 (Respondent). (*Withdrawn*).
- 1302-75-U:** International Chemical Workers Union Local 595 (Complainant) v. Domtar Packaging Limited, Corrugated Container Division Etobicoke Plant (Respondent). (*Withdrawn*).
- 1303-75-U:** United Electrical, Radio and Machine Workers of America (UE) (Complainant) v. Tellus Instruments Limited (Respondent). (*Withdrawn*).
- 1335-75-U:** Canadian Union of Operating Engineers, Local 103 (Complainant) v. Westinghouse Canada Limited (Respondent). (*Withdrawn*).
- 1347-75-U:** Michael Hancock & Cheryl Bell (Complainant) v. Diamond "Z" Association (Respondent). (*Withdrawn*).
- 1350-75-U:** Canadiann Union of Operating Engineers, Local 103 (Complainant) v. Ontario Paper Company Limited (Respondent). (*Withdrawn*).
- 1365-75-U:** Richard McNeil (Complainant) v. Automatic Sprinklers Ltd. (Respondent). (*Withdrawn*).

1366-75-U: Richard McNeil (Complainant) v. Local 787 Sprinkler Fitters Division United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

1375-75-U: H. T. G. Andrews (Complainant) v. Canadian Union of Golden Triangle Workers (C.N.T.U.) (Respondent). (*Withdrawn*).

1377-75-U: Teamsters Union Local 879 (Complainant) v. Checker Cartage (Waterloo) Ltd. (Respondent). (*Withdrawn*).

1403-75-U: Upholsterers International Union of North America, AFL-CIO (Complainant) v. Nesting Furniture Limited (Respondent). (*Withdrawn*).

1408-75-U: United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 1535 (Complainant) v. Northern Electric Company Limited (Respondent). (*Withdrawn*).

1412-75-U: Adelaide Pais (Complainant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers (Respondent). (*Withdrawn*).

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0641-75-R: United Cement, Lime & Gypsum Workers' International Union and its Local 219 (Applicants) v. Canada Cement Lafarge Ltd. and Point Anne Quarry Company, a division of Standard Industries Limited (Respondents) v. Christian Labour Association of Canada (Intervener). (*Dismissed*).

1176-75-R: Service Employees Union, Local 204 (Applicant) v. Birchcliffe Nursing Homes Ltd. (Respondent).

Jurisdictional Disputes

0989-75-JD: Labourers International Union of North America, Local 607 (Complainant) v. Stephen Zysko Construction Limited and Kilborn Engineering Limited and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Respondents). (*Withdrawn*).

1174-75-JD: Labourers' International Union of North America, Ontario Provincial District Council, by and on behalf of Locals 506 and 837 (Complainant) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 736, Stanley Structures Limited and Arthur G. McKee & Company of Canada Ltd. (Respondents). (*Withdrawn*).

Applications For Determination Under Section 95(2)

0935-75-M: Windsor News Company, Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 195, UAW (Respondent). (*Affirmative*).

0966-75-M: Canadian Union of Public Employees and its Local 53 (Applicant) v. The Corporation of the Town of Whitby (Respondent). (*Affirmative*).

1145-75-M: Ontario Nurses' Association (Applicant) v. Almonte General Hospital (Respondent). (*Withdrawn*).

1444-75-M: Draftsmen's Association of Ontario, Local 164, I.F.P.T.E. (Applicant) v. Collingwood Shipyards (Respondent). (*Withdrawn*).

Applications Under Section 112a

1247-75-M: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Eaglewood Construction Co. Limited & Vin-Ton Contracting Limited (Respondent). (*Dismissed*).

1304-75-M: The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 700 (Applicant) v. The Lummus Company Canada Limited (Respondent) v. The Ontario Erectors Association (Intervener). (*Dismissed*).

1324-75-M: The Ontario Council of the International Brotherhood of Painters & Allied Trades (Applicant) v. Paramount Painting and Decorating (London) Limited (Respondent). (*Withdrawn*).

1325-75-M: The Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1783 (Applicant) v. Engineered Painting Services Co. Inc. (Respondent). (*Withdrawn*).

1367-75-M: Built-Up Roofers' Damp and Waterproofers Section of the Sheet Metal Workers International Association Local 562 (Applicant) v. Pernfuss Roofing Company (Respondent). (*Withdrawn*).

1379-75-M: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Yorkland Drywall Systems Ltd. and National Walls and Acoustics Limited (Respondent). (*Withdrawn*).

Applications For Reconsideration Of Board's Decision – Certification

0516-75-R: Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124 Ottawa-Hull (Applicant) v. Carleton Formwork Limited (Respondent). (Request Denied).

1037-75-R: Brewery Soft Drink, Distillery, Distributors and Miscellaneous Workers, Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Pop Shoppes (Hamilton) Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Budd Automotive Company of Canada Limited (Respondent) v. Group of Employees (Objectors). (Request Denied).

1117-75-R: United Steelworkers of America (Applicant) v. Mac-Wood Machine Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

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TABLE I

APPLICATIONS AND COMPLAINTS FILED WITH THE ONTARIO LABOUR RELATIONS BOARD

	Number Filed		
	3rd Quarter Fiscal Year 1975-76	1st 9 Months Fiscal Year	
		1975-76	1974-75
I. Certification	272	903	1051
II. Declaration Terminating Bargaining Rights	13	47	34
III. Declaration of Successor Status	9	29	31
IV. Declaration that Strike Unlawful	19	84	86
V. Declaration that Lock-Out Unlawful	1	1	6
VI. Consent to Prosecute	26	114	116
VII. Complaint of Unfair Practice in Employment (Section 79)	82	217	124
VIII. Miscellaneous	43	115	238
TOTAL	<u>465</u>	<u>1510</u>	<u>1686</u>

TABLE II

HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD

	Number		
	3rd Quarter Fiscal Year 1975-76	1st 9 Months Fiscal Year	
		1975-76	1974-75
Hearings and Continuation of Hearings by the Board	376	1035	1006

TABLE III

**APPLICATIONS AND COMPLAINTS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD BY MAJOR TYPES**

	Number Disposed of		
	3rd Quarter Fiscal Year 1976-75	1st 9 Months Fiscal Year	
		1976-75	1975-74
I. Certification	274	946	1111
II. Declaration Terminating Bargaining Rights	11	45	35
III. Declaration of Successor Status	2	19	20
IV. Declaration that Strike Unlawful	22	67	75
V. Declaration that Lock-Out Unlawful	—	—	2
VI. Consent to Prosecute	33	85	103
VII. Complaint of Unfair Practice in Employment (Section 79)	73	198	154
VIII. Miscellaneous	35	97	235
	<hr/>	<hr/>	<hr/>
TOTAL	450	1457	1735
	<hr/>	<hr/>	<hr/>

TABLE IV

APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD
BY TYPE AND DISPOSITION

	Number of Applications			Number of Employees*		
	3rd Quarter	1st 6 Mths. F.Y.		3rd Quarter	1st 6 Mths. F.Y.	
	Fiscal Year	1975-76	1974-75	Fiscal Year	1975-76	1974-75
	1975-76	1975-76	1974-75	1975-76	1975-76	1974-75
I. Certification						
Granted	177	619	741	7013	22962	23182
Dismissed	57	188	247	1961	8369	14328
Withdrawn	40	139	123	1396	2961	3183
TOTAL	274	946	1111	10370	34292	40693
II. Termination of Bargaining Rights						
Granted	4	26	13	147	454	301
Dismissed	7	17	19	189	394	496
Withdrawn	—	2	3	—	339	1355
TOTAL	11	45	35	336	1187	2152

*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time the applications for certification were filed with the Board. Totals for applications dismissed and withdrawn are approximate.

TABLE IV

APPLICATIONS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD
BY TYPE AND DISPOSITION (CONTINUED)

		Number of Applications		
		3rd Quarter Fiscal Year 1975-76	1st 9 Months Fiscal Year	
			1975-76	1974-75
III.	Declaration that Strike Unlawful			
	Granted	9	31	10
	Dismissed	6	12	18
	Withdrawn	7	24	47
	TOTAL	<u>22</u>	<u>67</u>	<u>75</u>
IV.	Declaration that Lock-Out Unlawful			
	Granted	—	—	—
	Dismissed	—	—	3
	Withdrawn	—	—	—
	TOTAL	<u>—</u>	<u>—</u>	<u>3</u>
V.	Consent to Prosecute			
	Granted	3	11	9
	Dismissed	4	13	24
	Withdrawn	26	61	70
	TOTAL	<u>33</u>	<u>85</u>	<u>103</u>
VI.	Complaint of Unfair Practice in Employment (Section 79)			
	Granted	6	15	7
	Dismissed	15	50	71
	Withdrawn	52	133	76
	TOTAL	<u>73</u>	<u>198</u>	<u>154</u>

TABLE V

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	3rd Quarter	1st 9 Months Fiscal Year	
	Fiscal Year 1975-76	1975-76	1974-75
Certification after Vote*			
Pre-hearing Vote	4	44	47
Post-hearing Vote	13	58	75
Ballots not Counted	1	1	—
Dismissed after Vote			
Pre-hearing Vote	8	29	66
Post-hearing Vote	7	40	46
Ballots not Counted	—	1	2
TOTAL	<u>33</u>	<u>173</u>	<u>236</u>

*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE VI

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes		
	3rd Quarter	1st 9 Months Fiscal Year	
	Fiscal Year 1975-76	1975-76	1974-75
*Respondent Union Successful	1	3	4
Respondent Union Unsuccessful	3	20	11
TOTAL	<u>4</u>	<u>23</u>	<u>15</u>

*In Termination Proceedings where a vote is taken the applicant is a group of employees or the employer; the incumbent union is thus the respondent.



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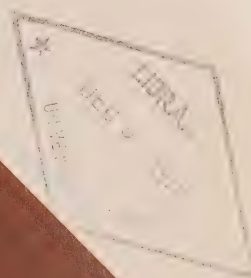
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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERI-
CA; JOHN H. WALKER, BUSINESS AGENT, LOCAL UNION 1316; TOM
HARKNESS, INTERNATIONAL REPRESENTATIVE, UNITED BROTHER-
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Timeliness – Construction Industry – Whether a past Board certificate and subsequent collective agreements rendered the applicant's application for certification untimely – Effect of bargaining out a classification of employee – Whether bargaining rights continued.

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Timeliness – Jurisdiction – Employees – Whether the Board's jurisdiction may be exercised equitably in raising a bar to the applicant's application for certification – Effect of an adverse ruling by an IMPARTIAL UMPIRE denying justification under the CLC CONSTITUTION to organize the respondent's employees – Effect of a violation of the CLC's “NO RAID” provisions of its constitution – S5 – Whether relevant to an application for certification – Whether a change in the duties and responsibilities of employees since the entering into of a collective agreement – Effect of the challenged employees being covered by the collective agreement – Whether employees for purposes of the Act.

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Trade Union – Procedure – Witnesses – Fraud – Whether sufficient particulars with respect to allegations of fraud in obtaining a Board certificate of trade union status – S50 – Whether compliance for particulars of a charge under S50 is dispositive of the issue – S94 – Effect of the presumption of trade union status – Whether a party to be permitted to adduce evidence with respect to fraud – *Statutory Powers Procedure Act* (1971) – S11(1) – Whether a witness subpoenaed by a party is to be permitted to participate in the Board’s proceedings.

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